83-558

No. 83-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether "medical treatment" such as clean intermittent catheterization is a "related service" required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor Respondent.

2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in *Southeastern Community College* v. *Davis*, *Pennhurst State School & Hospital* v. *Halderman*, and *State Board of Education* v. *Rowley*.

TABLE OF PARTIES BELOW

This Petition is submitted on behalf of the Irving Independent School District and its Board of Trustees. The parties below are as follows:

HENRI AND MARY TATRO, Individually and as Next Friend of Amber Tatro, a Minor,

Plaintiffs-Appellees Cross-Appellants

THE STATE OF TEXAS, TEXAS EDUCATION AGENCY,

Defendants

STATE BOARD OF EDUCATION AND ITS MEMBERS: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William P. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; ALTON BOWEN, COMMISSIONER OF EDUCATION,

Defendants-Appellants

THE IRVING INDEPENDENT SCHOOL DISTRICT, ITS BOARD OF TRUSTEES: Roger Hill, Robert Pierce (no longer on Board), Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes; James W. Fillbeck has now replaced Robert Pierce on the Board,

Defendants-Appellants Cross-Appellees

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IN THE

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OCTOBER TERM, 1983

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IRVING INDEPENDENT SCHOOL DISTRICT,
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HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Irving Independent School District and its Board of Trustees, John Stipes, Roger Hill, Pat Norman, Vickie Tatum, Troy W. Kelley, Anne Pfaff, and James W. Filbeck, hereby petition that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 25, 1983.

I. OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 823 and is printed in the Appendix hereto at pages 64a to 83a. The Opinion of the Federal District Court for the Northern District of Texas is reported at 516 F.Supp. 968 and is printed in the Appendix hereto at pages 1a to

36a. The Opinion below is the second Opinion is this case. The first Opinion of the Court of Appeals (hereafter *Tatro I*) is reported at 625 F.2d 557 (1980) and is printed in the Appendix hereto at 94a to 109a. The Opinion of the District Court in *Tatro I* is reported at 481 F.Supp. 1224 (1973) and is printed in the Appendix hereto at pages 86a to 93a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1983. A timely Motion for Rehearing and Suggestion for Rehearing En Banc was denied on July 5, 1983; and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions relevant to this petition are set forth verbatim in the Appendix hereto:

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (1976):

Section 1401-Definitions
Section 1415-Procedural Safeguards

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.:

Section 794, 794a

State Statutes:

Article 4495(b) § 3.06(d)(1),
Tex.Rev.Civ.Stat.Ann.
(Vernon Supp. 1982-83)

IV. STATEMENT OF THE CASE

In early 1979, when the minor Respondent was 3½ years old, her mother asked the Irving Independent School District to provide special education for her. The District agreed, and in a series of meetings developed an Individual Education Program ("IEP") for the child. The IEP did not provide for clean intermittent catheterization ("C.I.C."), which procedure was stipulated by the parties and subsequently found by the District Court to be medical treatment requiring a valid prescription of a physician and other physician's services. The School District maintained that since C.I.C. was medical treatment, it had no legal obligation to provide for nor administer C.I.C..

The parents pursued an administrative appeal through the Texas State Board of Education, which agreed with the School District's decision, holding that the child's IEP met with the standards of the State Education Agency and complied with applicable statutes and regulations.

The parents then brought an action in the Federal District Court for the Northern District of Texas basing their claims upon the Education for All Handicapped Children Act (EAHCA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Civil Rights Act, 42 U.S.C. § 1983, requesting both monetary and injunctive relief.

The District Court denied the application for preliminary injunction to require the School District to provide C.I.C., holding that C.I.C. was not a related service within the meaning of the EAHCA because the need for it did not arise from the effort to educate and that the Plaintiffs could not convert a statute prohibiting discrimination in certain governmental programs [Section 504] to a statute requiring, in essence, the setting up of governmental health care for people seeking to partici-

pate in such programs. App. p. 92a. On original submission, the Court of Appeals for the Fifth Circuit, on assumed facts, remanded for trial determining that, on the assumed facts, failure to provide C.I.C. violated both the EAHCA and Section 504 of the Rehabilitation Act. *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980) App. p. 92a.

On remand, the District Court, feeling constrained by *Tatro I* App. p. 94a, ordered Petitioner to modify the child's IEP to include provisions for C.I.C. in accordance with and as prescribed by a valid medical prescription provided by the child. Although the Court believed that *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), reinforced its doubts that § 504 required C.I.C., it felt sufficiently constrained by *Tatro I* App. p. 31a, and without finding a specific violation of § 504, awarded attorneys fees pursuant to 29 U.S.C. § 794a(b).

All parties appealed; and the 5th Circuit Court of Appeals, relying heavily on "law of the case doctrine," affirmed. The panel decision reflects that were the panel "writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's education program." App. p. 67a. The panel further found that although *Pennhurst* reinforced the District Court's doubts that Section 504 required C.I.C., it concluded that the Supreme Court had not spoken with sufficient clarity in *Pennhurst* to allow the single panel to overrule the previous panel's decision in *Tatro I*.

Petitioners filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc, which motions were

denied by order dated July, 1983. App. p. 84a. Petitioners now present this Application for Writ of Certiorari.

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents Questions Of Great Public Importance Concerning The Scope Of "Noneducational" Services Required To Be Provided By State And Local Education Agencies Under The Education For All Handicapped Children Act Of 1975.

The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (hereinafter called "the Act"), is a funding statute intended to assist the states in providing an education for handicapped children. The Act has been the subject of much litigation and has been described as "Delphic" by both lower courts. This Court, in *Board of Education* v. *Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982), removed much of the ambiguity from the Act for the benefit of state and local education agencies, emphasizing that the Act was designed to assist handicapped children to benefit *educationally*. This Court further held that the requirement of a free appropriate public education (FAPE) is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit *educationally* from that instruction. *Rowley*, *supra*, at 3048 (emphasis added). The critical question remaining which is of major public interest is the extent to which states are obligated to provide "support services" and whether such "support services" must relate to the effort to educate, the paramount issue being whether the Act requires state and local education agencies to provide "medical treatment" prescribed by the handicapped child's attending physician.

Petitioner recognizes that this Court denied certiorari in *Pennsylvania Department of Education* v. *Tokarcik*,

665 F.2d 443 (3rd Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 3508, a case involving C.I.C.. However, the critical distinction between *Tokarcik* and this case is that in this case, the procedure C.I.C. was stipulated by the parties to be "medical treatment"; that it was the treatment of choice of most medical centers; that prescribing C.I.C. or other treatment of a neurogenic bladder is the sole responsibility of the treating physician; and that it is a medical function. The District Court further found that C.I.C. required more services from the physician than diagnostic and evaluation services in determining a handicapping condition and that absent a valid physician's prescription, providing C.I.C. would be unlawful in violation of the Texas Medical Practices Act. Tex.Rev.Civ.Stat.Ann., Art. 4495b § 3.06(d)(1) (Vernon Supp. 1982-83) App. p. 113a. The Court of Appeals failed to address the "medical treatment" question squarely and determined that since the procedure could be performed by persons other than licensed physicians without violating prohibitions against practicing medicine without a license, the procedure was a "related service" under the Act. 20 U.S.C. § 1401(17) (1976) App. p. 110a. Unfortunately, major questions of significant importance to the general public are left unanswered and elucidate the need for a definitive answer from this Court.

Does the opinion below require that any medical treatment prescribed by an attending physician be performed and paid for by the education agency if a general health hazard might result otherwise? Are schools required to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school? Does the Act create "national health care" through the public school system and obligate the local systems to provide same at no cost to the parent? Concommitent to these questions of

national importance if the answer is affirmative is the significance of additional planning necessary to the implementation of such requirements. If states and local education agencies are required to provide medical treatment, budgeting on the local level is of nation-wide importance. The additional revenue necessary to provide for the treatment, the personnel necessary for implementation of same, and insurance necessary to guard against liability for potentially catastrophic losses must be considered. These additional funds can come only from the individual taxpayer. Certainly the states, the local education agencies, and the individual taxpayers are entitled to a definitive answer regarding whether or not this funding statute has created an affirmative obligation to provide "medical treatment" to handicapped students.

Under the Act, "related services" are defined as follows:

> "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

20 U.S.C. § 1401(17) App. p. 110a. In the first appeal of this case, the Court of Appeals, in what Petitioner believes is an advisory opinion, held that C.I.C. was a related service because it could be performed by persons other than licensed physicians. App.p, 105a. It is important to remember that at the time of the first opinion, the parties had not stipulated that the procedure was medical

treatment. The opinion of the Court of Appeals sought to be reviewed herein overlooks this stipulation and followed the first opinion under the "law of the case" doctrine. App. p. 67a. The decision in question states that the School District argued that C.I.C. could not be performed unless a physician is physically present to supervise and control the procedure. App. p. 69a. Such has never been the position of Petitioner. However, Petitioner does submit that C.I.C. is "medical treatment" as stipulated by the parties and that in order to be performed, more is required from the physician than diagnosis and evaluation. The District Court on remand of the first appeal found that when delegating prescribed medical treatment, the physician must:

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure;

(4) determine if the treament is being properly performed and is progressing without complication;

(5) monitor the patient's progress and perform the numerous physician duties discussed in Amicus Brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand. 516 F.Supp. at 987 App. p. 37a.

Thus it is clear that extensive services of a licensed physician are required to administer the prescribed medical treatment and such treatment is not a related service as defined by the Act, nor is it a medical service as defined at 34 C.F.R. § 300.13(b)(4). Since the public school em-

ployee cannot administer the prescribed treatment without a valid physician's prescription and other services of a licensed physician, the public school employee is not a "qualified person" as contemplated in the definition of "school health services" at 34 C.F.R. § 300.13(b)10. The Court of Appeals held that a valid prescription and physician supervision were necessary, but still determined that the procedure was a related service. App. p. 72a. The issue is not whether certain medical treatment such as C.I.C. can be performed by persons other than physicians. The issue is whether the Act requires that medical treatment other than for diagnostic and evaluation purposes be provided by the funding recipient. The statutory definition certainly does not contemplate the provision of medical treatment; and Petitioner submits that if the implementing regulations require same, they run afoul of this Court's opinion in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1971).

Petitioner understands that medical treatment such as kidney dialysis is delegated to and performed by technicians and nurses. A literal interpretation of the opinion of the Court of Appeals would transform this obvious medical treatment into a related service because it can be prescribed and delegated by a physician. Certainly, the Act neither contemplates nor requires recipients of funds to assume such obligations and responsibilities. The next obvious question is whether the recipients (state and local education agencies) are required to provide the personnel and equipment necessary to implement the medical treatment prescribed. Since special education and related services must be provided at public expense and at no cost to the parent, the answer must be in the affirmative.

It is undisputed that the child involved in this case is physically able to attend school. The courts below found, however, that to attend school without C.I.C., the child would suffer a potential risk and danger to her general health, as would a child in need of kidney dialysis. Whether or not states and local schools are required by the Act to provide the medical treatment necessary to avoid the potential general health risk is of monumental importance and should be definitively answered by this Court.

B. The Decision Below Conflicts With Applicable Decisions Of This Court.

In *Rowley, supra*, 102 S.Ct. at 3041, this Court set forth the role of the courts in suits brought under the Education for All Handicapped Children Act (EAHCA). "A court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the state complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive *educational* benefits. (Emphasis added.) Respondents have never asserted that the State or Local District failed to comply with the procedural requirements of the Act. Moreover, they have never asserted that the State's plan violates the Act. They have only asserted that the child's IEP should include the medical treatment desired, which medical treatment is not related to the educational effort, but to general health considerations. Thus, the Court of Appeals and the District Court have overlooked the educational nexus described by this Court in *Rowley*. The Court of Appeals determined that the thorny issue of what circumstances might call for judicial modification of an IEP was unnecessary since the District did not present evidence that the educational setting established by the

IEP was not appropriate. App. p. 76a. However, although the State Board of Education found that the IEP met with the standards of the State Education Agency and complied with applicable statutes and regulations, an assertion was never made that the State plan violated EAHCA requirements, the Courts below ordered the State and Petitioner to modify the child's IEP to include C.I.C.. Therefore, the District Court and the Court of Appeals have judicially modified the child's IEP to include an alleged "related service" which was stipulated to be "medical treatment" and which is totally unrelated to the effort to educate. In *Rowley, supra*, 1025 S.Ct. at 3049, n.26, this Court quoted its opinion in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), in construing the EAHCA as being also enacted pursuant to Congress' spending power as follows:

> "As already demonstrated, the Act and its history imposes no requirements on the states like those imposed by the District Court and the Court of Appeals. A fortiori, Congress has not done so unambiguously, as required in the valid exercise of its spending power."

Although § 1401(17) App. p. 110a specifically limits medical services to those having to do with diagnosis and evaluation, the District Court and the Court of Appeals have judicially modified the child's IEP to include "medical treatment" not unambiguously required by Congress. Therefore, the decisions of the District Court and the Court of Appeals are in conflict with this Court's prior opinion in both *Rowley* and *Pennhurst;* and this Writ should be granted.

In *Rowley*, this Court determined that, if the requirements of its twofold inquiry under the EAHCA were met, the state has complied with the obligations imposed by Congress; and the courts can require no more. *Rowley*,

102 S.Ct. at 3051. In *Pennhurst*, 101 S.Ct. at 1545, this Court referred to its decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, stressing that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so. The Court of Appeals misconstrued this Court's decisions in *Rowley*, *Pennhurst*, and *Davis* by imposing an affirmative obligation to provide medical treatment pursuant to the EAHCA, which is a funding statute. Certainly, the State of Texas, through the State's local school districts, has not voluntarily and knowingly accepted the potentially massive financial obligations of providing medical treatment by contracting to receive federal assistance for education for the handicapped.

Although the Court of Appeals recognized the issues presented by this Court's decisions, the panel felt constrained to follow the decision in *Tatro I*. App. p. 79a.

The Court of Appeals also discussed this Court's decisions in *Pennhurst* and *Davis* when determining that the District Court properly awarded attorneys' fees under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, again relying on the decision in *Tatro I* App. p. 79a. The District Court and the Court of Appeals determined that this Court had not spoken with sufficient clarity in *Pennhurst* to allow departure from the decision of the Court of Appeals in *Tatro I* holding that refusal to provide C.I.C. violated § 504. In view of *Pennhurst*, *Rowley*, and *Davis*, C.I.C., which is stipulated to be medical treatment, is not required by the EAHCA or the Rehabilitation Act;' and as this Court stated in *Davis*, if the regulations implementing the Act can be read to have imposed such an affirmative obligation, then such regulations con-

stitute an unauthorized extension of the obligation imposed by the statute. *Davis*, 99 S.Ct. at 2369. Since both the EAHCA and the Rehabilitation Act are funding statutes, the above language applies. The courts below, determining that medical treatment is a related service and that failure to provide same violates both the EAHCA and the Rehabilitation Act and awarding attorneys' fees under § 504, have misapplied this Court's decisions in *Rowley*, *Pennhurst*, and *Davis*. Therefore, important federal questions have been decided in conflict with applicable decisions of this Court, and this Court should grant review herein.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH VICEROY, JR. CLERK
By ????????
Deputy

MEMORANDUM OPINION

Amber Tatro is a five year old female suffering from myelomenengocele, commonly known as spinal bifida.[1] As a result of

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[1] In accordance with the Court of Appeals' Order of Remand in *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980), this court has tried this case. This opinion sets forth the court's findings of fact and conclusions of law. The general nature of this suit has been described both at 481 F.Supp. 1224 (N.D.Tex. 1979) and 625 F.2d 557 (5th Cir. 1980).

The parties stipulated in the Pre-Trial Order that the preparation, materials and procedure for performing CIC on females is generally as follows:

(1) Equipment and Materials:

(a) Clean catheter in size prescribed by treating physician;

this birth defect, Amber suffers from orthopedic and speech impediments and a neurogenic bladder. Because of her bladder condition, Amber is unable to void voluntarily, and must be catheterized several times each day. The method of choice is Clean Intermittent Catheterization ("CIC").

(b) Catheter carrying containers;

(c) Catheter extension when patient is in a wheelchair;

(d) Clear plastic liquid detergent container with a hanger when patient is in a wheelchair;

(e) Soap and water;

(f) Container for catching the urine;

(g) Table or desk on which to place the child;

(h) Large underpad to prevent soaking of liners or other table covering; and

(i) Water soluable lubricant.

(2) Preparation and Procedure:

(a) Get all the equipment and materials ready.

(b) Wash hands with soap and water.

(c) Get the child ready and place her on her back on the table or desk (CIC is easier to perform at table or desk height).

(d) Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction (never working in an upward direction since doing so will move germs from around the rectum up into the area of the bladder opening).

(e) Hold the catheter one inch from the tip and insert it into the urethra until the urine flows.

(f) Hold the catheter in place until the urine stops draining, then push the catheter in another inch or so to be sure the bladder is completely emptied.

(g) Remove the catheter slowly, stopping any time urine flows so as to empty the bladder completely. When the catheter is ready to come out, hold the catheter tip up so that the urine will drain down from the tip of the catheter and not on you.

(h) After noting and recording the amount of urine obtained, its appearance for any abnormality, discard the urine.

(i) Clean the catheter with soap and water, allow it to dry and place it in a clean, dry envelope. At least once a day after the catheter has been washed with soap and water, place it in a pot of

In early 1979 Mary Tatro, Amber's mother, asked the Irving Independent School District ("school district") to provide Amber with special education. After testing Amber, the school district developed an Individual Education Program ("IEP") which it believed would provide Amber with the necessary educational and therapeutic services. Amber then was recommended for placement in the school district's Early Childhood Development Classes beginning September, 1979. The school district, however, maintained that it had no obligation to provide CIC.

In June of 1979, Amber's parents appealed to an Impartial Due Process Hearing Officer the school district's decision not to provide CIC. They did not otherwise question the appropriateness of the IEP. The Hearing Officer found the school district to be obligated to furnish CIC, and recommended that Amber's IEP be modified accordingly. This decision was appealed to and affirmed by the State Commissioner of Education. The school district then appealed to the State Board of Education, which reversed the Commissioner.

On October 12, 1979, the Tatros brought this action seeking an injunction ordering defendants[2] to provide Amber with CIC and to recover compensatory damages and attorneys' fees.

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water and boil for 20 minutes. Allow it to air dry and place it in a clean dry envelope.

(j) Catheterize at prescribed intervals so that there is never more than 5 ounces (150cc) of urine in the bladder at any one time for a female child of one to five years of age.

(k) Keep a daily record of the time of catheterization, the amount of urine obtained, and if the child is wet, damp or dry.

(l) Do not crede the bladder as it may push urine back into the kidneys.

[2] As of the Amended Complaint of November 8, 1979, the defendants are the State of Texas, The Texas Education Agency, Alton Bowen (the Commissioner of Education), the State Board of Education, the individual members of the Board of Education, the school district, the Board of Trustees for the school district, the individual members of the Board of Trustees, and J. F. Townley, individually,

In its Memorandum Opinion filed December 21, 1979, 481 F.Supp. 1224, this court, relying upon a written stipulation of facts believed to have been agreed to by the Tatros and the District, held that neither the Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401 *et seq.*, nor the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, requires the school district to provide Amber with CIC. After the December 21, 1979 Order, the school district advised the Court of Appeals, but not this court, that it had not actually signed the filed written stipulation. On September 2, 1980, the Court of Appeals vacated that ruling, and held that the school district was obligated under both the EAHCA and § 504 of the Rehabilitation Act to furnish CIC. 625 F.2d 557. In remanding for further proceedings, the Court of Appeals recognized that there was no factual record upon which to base an opinion, but nonetheless proceeded to address the merits of the case. The court then directed this court to make appropriate findings to determine whether plaintiffs are entitled to relief under either statute as construed by it. 625 F.2d at 558 n.1.

Applying the Act as interpreted by the Court of Appeals, on January 16, 1981, this court issued an Interim Order directing the school district to provide Amber with such CIC as necessary to her IEP. Amber was enrolled with the school district on January 19th, and until January 23rd, the school district provided CIC. During that week a dispute between the school district and Mary Tatro developed concerning the adequacy of a parental consent form with attached physician's prescription submitted by Mary Tatro to the school district. Believing the consent inadequate and that it was not required under the Interim Order to furnish CIC without a valid consent form, the school district discontinued CIC on January 26th. Amber, however, continued to attend her classes, with CIC provided

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as superintendent of the school district. Although it is unclear from the pleading, plaintiffs indicated at the hearing that the named individuals are sued in their individual capacity. Townley was dismissed from this action by Order of December 21, 1979.

by her babysitter as necessary. On March 13, 1981, the Tatros questioned the school district decision by filing a motion for sanctions. At the hearing on the motion, a consent form and physician's prescription acceptable to both the Tatros and the school district was agreed upon. With this collateral dispute resolved, the school district resumed CIC on April 1, 1981 (after spring vacation). A final hearing was held on April 23, 1981, to allow the Tatros to offer additional evidence as to damages and to supplement their request for attorneys' fees. At this hearing, the court denied the motion for sanctions because it found that the school district had acted properly, and within the spirit of the Interim Order.

At the outset, it is important to place the school district's refusal in perspective. At no time has the school district refused to place Amber in its Early Childhood Development Classes. Instead, the school district urged Amber's parents to enroll her in the program and make private arrangements for CIC pending the final disposition of the legal dispute.[3] Despite the benefits of placing Amber in the program, her parents chose to forego such an arrangement, and instead kept Amber at the Helping Hand Development Center[4] for an additional

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[3] Although Amber's parents apparently expressed an initial preference for a full day rather than the half day program in which Amber would have been enrolled, the only aspect of the IEP raised at the administrative proceedings or before this court was the school district's unwillingness to furnish CIC.

[4] The Center provides theraputic services for the mentally and physically handicapped. It does not offer educational services. From September through December, 1980, Amber was enrolled at the Special World Day Care Center, where she received kindergarten classes. While there, she was transported to the Helping Hand Development Center several times each week for physical therapy.

year. Amber's parents did not attempt to enroll Amber with the school district for the 1980/81 school year.[5]

The State Defendants

In its Memorandum Opinion of December 31, 1980, this court dismissed any claims for retrospective relief against the State defendants (the State of Texas, the Texas Education Agency and the State Board of Education) on the basis of their 11th Amendment immunity.[6] *See Quern* v. *Jordan*, 440 U.S. 332 (1979). Because the State Board of Education has supervisory responsibility for assuring that Amber is educated in accordance with the EAHCA, *see* 20 U.S.C. § 1412(6); *S-1* v. *Turlington*, 635 F.2d 342, 350 (5th Cir. 1981); *Kruelle* v. *New Castle County School Dist.*, Nos. 80-1875, 80-1876, 80-2063, 80-2064 (3rd Cir., April 1, 1981), the members of the State Board of Education will be retained in their official capacities for the purpose of injunctive relief. Plaintiffs joined the State Commissioner of Education in his capacity as "director" of the Texas Education Agency. Because the members of the Board of Education are the proper parties for injunctive relief, the Commissioner is DISMISSED in his official capacity. The State of Texas and the Texas Education Agency are DISMISSED. *See Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978).

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[5] By letter of September 9, 1980, and again, by letter of October 21, 1980, the school district requested permission to reevaluate Amber so as to update her IEP. Mary Tatro, in a letter dated November 20, 1980, informed the school district that she believed a new assessment to be inappropriate, but agreed to allow Scottish Rite Hospital to provide the school district with some information.

[6] Such an immunity also applies to Commissioner Bowen and the members of the State Board of Education to the extent they are sued in their official capacity.

Commissioner Bowen And The Members Of The State Board Of Education

There is no prospective relief to which plaintiffs are entitled against Commissioner Bowen or the members of the State Board of Education in their individual capacities.

State officials sued in their individual capacities do not, of course, share their State's 11th Amendment immunity. They, however, are entitled to a qualified good-faith immunity, provided such defense is properly pled. *See Wood* v. *Strickland*, 420 U.S. 308 (1975);[7] *Gomez* v. *Toledo*, 100 S.Ct. 1970 (1980).

The record is bereft of any evidence that Commissioner Bowen or any member of the State Board of Education acted with anything but good-faith. There is no evidence that they intentionally attempted to violate plaintiffs' rights or acted with malice toward plaintiffs. In that the Board's decision that CIC is not a "related service"[8] was affirmed by a federal district court, it cannot be found that its members knew or reasonably should have known that such is not the case.

Having pled the good-faith defense, there being no evidence that they acted in any other manner, and the uncertainty of the law providing affirmative evidence of good-faith, Commissioner Bowen and the individual members of the State Board of Education are DISMISSED.

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[7] In *Wood* the Court recognized a qualified good-faith immunity from liability for damages under § 1983. The Court found that there was no basis for believing that Congress intended to eliminate the traditional common law good-faith immunity available to school officials. 420 U.S. at 318-22. Even assuming that damages are available under the EAHCA or § 504, there is no basis for believing that Congress intended to abrogate that good-faith immunity through either statute.

[8] Commissioner Bowen affirmed the Hearing Officer's finding that CIC is a "related service." Plaintiffs have never clarified why this decision should subject the Commissioner to personal liability for compensatory damages.

The Members Of The Board Of Trustees

Plaintiffs also have joined the individual members of the Board of Trustees of the school district. In that there is no equitable relief to which plaintiffs are entitled against the individual Trustees, plaintiffs' sole basis for the Trustees' presence in their individual capacities is that they may be liable for compensatory damages.

Plaintiffs have advanced one argument for why the Trustees are not entitled to the *Woods* v. *Strickland* qualified good-faith immunity. Plaintiffs contend that as a result of a Department of Health, Education and Welfare letter of September 27, 1979, the Trustees knew or should have known that they were violating plaintiffs' rights. That letter informed the superintendent of the school district that the Office for Civil Rights had concluded from its investigation that the school district was violating § 504 by not providing CIC. It should be noted, however, that the letter was sent almost three weeks after the school district's decision had been affirmed by the State Board of Education.[9]

There is no evidence that the Trustees acted with malice or intentionally attempted to deprive plaintiffs of their rights. The President of the Board of Trustees testified that it was the belief of the Board that the school district was not legally obligated to provide CIC. He further testified that the Board was concerned that CIC is a medical practice, and, therefore, cannot be performed lawfully by employees of the school district. *See* pages 11-13, *infra*.

If for no other reason, because the Board of Trustee's construction of applicable federal law was upheld by the State Board of Education, and, later, by this court, the members of the Board of Trustees are not deprived of their qualified good-

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[9] HEW's conclusion that the school district was violating § 504 was based, in part, on the finding that CIC is a "related service," as defined by 45 C.F.R. § 121a.13. The Board of Education previously had ruled that CIC is not a "related service."

faith immunity by the HEW letter. Although the Board's belief as to its duty to furnish CIC has to date proved to be an incorrect assessment of the law, it was not an unreasonable conclusion. *See Wood* v. *Strickland, supra,* at 321-22.[10] The members of the Board of Trustees are DISMISSED in their individual capacities.

The EAHCA

In its 1979 Memorandum Opinion, this court held that CIC is not a "related service" within the meaning of 20 U.S.C. § 1401(17) and that the EAHCA, therefore, does not require the school district to furnish CIC. Defendants argued that CIC is a medical service, and thus not covered by the Act. Under this court's view it was unnecessary to reach this definitional issue. This court found that Congress had not intended "related services" to sweep so broadly as to include services which do not "arise from the effort to educate." The Court of Appeals disagreed with that construction. The school district now returns to its earlier argument that CIC is an exempt medical service. This court will first describe CIC and then turn to its proper classification under the EAHCA.

Despite its present widespread use, CIC has become an accepted procedure only in recent years. Before CIC became an accepted practice, a substantial number of physicians believed that penetration of the urethra ought to be done only in a sterile environment with sterile instruments. The only alternative entailed exerting manual pressure upon the bladder. This pressure technique, however, presented a risk of reflux of fluid and injury to the kidneys. CIC is a far more simple

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[10] The Court in *Wood* was concerned that ignorance not be used as a basis for immunizing violations of "clearly established constitutional rights." The obligation of a school district to furnish CIC hardly can be considered a settled question of law. As noted in *Wood*, school board members cannot be "charged with predicting the future course of [the] law." 420 U.S. at 322.

procedure. The catheter need not be sterile nor must its use be confined to a sterile environment. Obviously, CIC requires relatively less direct medical superintendence than this earlier used method.

There is dispute about when Amber must be catheterized each day. The parties stipulated that Amber must be catheterized approximately four times a day, but the stipulation does not further address when it is needed despite the fact that her need for catheterization on any given day largely is a function of her fluid intake. Because Amber has no sensation of bladder fullness, she is dependent upon a routinized schedule of catheterization to insure proper voiding.[11] The evidence indicates that CIC performed approximately every three to four hours is sufficient to prevent injury to Amber's health. The appropriate schedule may vary, however, as Amber continues to mature.

In sum, CIC has become a relatively simple procedure that can be taught in less than an hour. Amber has been catheterized by her parents, her babysitter, her teachers and teachers' aides at the Helping Hand Development Center, and her teenage brother. In a few years, Amber should be able to catheterize herself.

EAHCA

The EAHCA does not define medical services, except to provide that only medical services for diagnostic and evaluation purposes are related services. 20 U.S.C. § 1401(17). The implementing regulations shed a little more light. They define medical services as "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services." 45 C.F.R. § 121a.13(b)(4). The regulations further provide that "school health services" are related serv-

[11] Improper voiding may result in influx, a condition in which urine backs up in the kidneys.

ices, and, by implication, not exempt medical services. *Id.* § 121a.13(a). "School health services" are defined as "services provided by a qualified school nurse or other qualified person." *Id.* § 121a.13(b)(10). The statute and its implementing regulations suggest that medical services are services that can be provided lawfully only by a licensed physician. But they give no direct guidance as to precisely what "provided by a licensed physician" means.

The school district argues that all services that must be performed under the control and supervision of a licensed physician are "provided by a licensed physician." Plaintiffs' response seems to be that the appropriate test is not one of control and supervision, but whether CIC must be performed only in the presence of a physician.

Texas Law

This court is here construing an act of Congress of nationwide application. And it ought to be given a uniform construction. Yet Congress, by defining the Act's reach by definitions locatable only in the law of the respective States, perforce intended, at least to this extent, that its construction be parochial. A contrary view would require a finding that Congress intended to alter patient-doctor relations in the several States. Stating the proposition answers it. The types of medical treatment that can be performed by nonphysicians, and the extent to which any treatment must be under the control and supervision of a licensed physician, are regulated by State law. And the courts must look to State law to determine whether a service is a medical service. To the extent of the accommodation of varying practices, the Act tolerates non-uniform application. A given service, therefore, may be a related service in one State and an exempt medical service in another.[12] This court turns now to the law of Texas.

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[12] That State law must determine who can provide a service is recognized by the commentary following § 121a.13, which states:

> There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a

The school district contends that under the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, art. 4495, *et seq.* (Vernon 1976), its employees can provide CIC only if they are under the control and supervision of a licensed physician. To furnish CIC without such direction, it argues, would be to engage in the unlawful practice of medicine. *Id.*, art. 4510, 4510a & 4510b. Yet, to require it to retain a physician to control and supervise the provision of CIC would convert CIC into a medical service it is not required to furnish.

This court has been forced to inquire into the legal responsibility of Texas physicians to control and supervise prescribed treatment, a subject that has received little judicial attention. The task includes fitting together a three party relationship: the school district, the child and the child's doctor. The interest and concern of the medical profession is plain. At a practical level it makes little sense to require school districts to provide a service that cannot be provided without a prescription if physicians will not write them for fear of running afoul of their own Practice Act and the demands of their malpractice insurance carriers. For these reasons, this court invited the Texas Medical Association and the Dallas County Medical Society to participate as amicus curiae. The medical societies submitted a joint brief stating their view of the Texas Medical Practice Act.[12A]

The parties agree that the school district cannot provide CIC without a valid medical prescription. To do so would constitute the practice of medicine in violation of Article 4510b. A physician, however, may prescribe treatment to be performed by

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variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

[12A] For the aid of treating physicians, their brief is attached as an appendix to this Opinion.

another individual or an institution if he believes that individual or institution capable of providing the prescribed service in a competent manner. Such treatment by the delegate does not constitute the unlawful practice of medicine. *See Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123, 129-30 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Nor is the physician obligated to supervise directly the treatment he has prescribed; his duty is to ascertain that the person or institution providing the treatment in conformity with his prescription is adequately qualified.

This construction is consistent with the Texas Nursing Practice Act, *Tex. Rev. Civ. Stat. Ann.* art. 4513 *et seq.* (Vernon 1976). Article 4518(5) of that Act defines professional nursing "as the performance for compensation of any nursing act . . . in the administration of medications or treatments as prescribed by a licensed physician." *Id.* (Vernon Supp. 1980-81). Providing such treatment is a nursing act, and, therefore, not unlawful practice of medicine whether or not the nurse is under the direct supervision and control of the prescribing physician. *See Op. Tex. Atty. Gen.* No. H-1295 (Dec. 28, 1978) ("Professional nurses may also administer medications and treatments on a physician's prescription . . . without any statutory requirement of direct supervision by the physician.")

A physician thus may prescribe CIC to be furnished by a school district if he believes that the district has personnel qualified to perform CIC.[13] The school district retains professional nurses. CIC has been prescribed for Amber by a licensed physician, and a proper prescription for such treatment now has been submitted to the school district. Moreover, the parties concede that with only minimal additional training a professional nurse should be more than capable of performing CIC. In sum, the court is persuaded that furnishing CIC does

[13] It follows that a school district must secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school.

not constitute the unlawful practice of medicine when performed by professional nurses in accordance with a valid medical prescription. *See Tex. Rev. Civ. Stat. Ann.* art. 4510b (Vernon 1976).[14] Because services that can be provided by qualified school nurses are "school health services," and, therefore, "related services," *see* page 10, *supra*, CIC is not an exempt "medical service" within the meaning of the EAHCA.[15]

The school district contends that even if CIC is not a medical service, it is not a related service in her case because it is not

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[14] This court does not hold that CIC can only be performed lawfully by professional nurses. Lay persons, with proper medical training, may, in accordance with a valid prescription, provide treatment that without such training and prescription would be considered unlawful practice of medicine. Plaintiffs have presented testimony that Scottish Rite Hospital will provide to school district employees free instruction in CIC. Provided the physician has ascertained that such training is sufficient to qualify a person to perform CIC, he can prescribe CIC to be furnished by a school district through its professional nurses *or* those non-nursing employees who have received such training.

[15] It is unclear whether a physician is liable for independent acts of negligence of school district employees performing services in conformity with his prescription. In *Sparger* v. *Worley Hospital, Inc.*, 547 S.W.2d 582 (Tex. 1977), the Texas Supreme Court rejected the "captain of the ship" doctrine in favor of the "borrowed servant" doctrine. Arguably, under *Sparger*, the prescribing physician would not be liable for independent acts of negligence by school district employees as long as he exercised ordinary care in prescribing that the treatment be performed by school district personnel. But, to the extent that a physician controls, supervises, or instructs unlicensed persons providing nursing care, he may be liable for their acts. *See Op. Tex. Atty. Gen.* No. MW-318, at 1016-17 (April 1, 1981). Although the Attorney General takes a somewhat narrower view, *see id.*, on the facts of *Sparger*, it does not appear that a prescribing physician exercising ordinary care would be liable for the school district's negligence simply because he prescribed the treatment. But the question has not been dispositively resolved by the Texas courts.

"required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17). Specifically, they argue that Amber can attend the school district's Early Childhood Development Classes without CIC during her hours of attendance.

The majority of five-year olds in the school district attend a half-day program, and only ??? attend more than half-day. Upon recommendations of the district's Coordinator for Early Childhood Training, Amber has been placed in the half-day program which lasts two hours and forty-five minutes. While there was no evidence as to the exact time needed to bus Amber to school, its range is approximately fifteen to thirty minutes each way. Assuming the maximum thirty minutes, Amber will be under the school district's supervision for almost four hours each school day.

This court finds that Amber will require catheterization during her school hours if she is to attend the school district's half-day program. The medical evidence presented at trial establishes that while it cannot be determined definitively whether a daily interval of four hours between catheterizations will injure Amber, it does present a risk of serious injury. Amber is not required to accept such a risk in order to attend school. Under the EAHCA, Amber is entitled to have her IEP modified to have the school district furnish CIC. Without such a modification, Amber's IEP fails to provide a "related service" that is "required to assist [Amber] to benefit from special education." 20 U.S.C. § 1401(17).

For the stated reasons, the school district is ordered to modify Amber's IEP to provide for CIC as prescribed by her personal physician.[16] In this regard, this court finds that plain-

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[16] Although this court uses the term "personal physician" in its Order, any physician treating Amber regularly may prescribe CIC. It also is not necessary that the prescribed treatment be identical to the procedures set out in the pre-trial order, *see* note 1 *supra*, so long as they are prescribed by a licensed physician. Throughout this dispute, one of the school district's stated concerns has been that it

tiffs will suffer irreparable harm if such prospective relief is withheld, that the cost to defendants from such an order is minimal, and that the public interest is served by ensuring that Amber receives a free appropriate public education.[17]

§ 504

Because plaintiff's recovery of counsel fees may ultimately turn on whether a violation of § 504 has been proved, that statute is discussed in that context. *See* pages 30-31, *infra*.

Damages

The Tatros seek damages for expenses incurred in sending Amber to the Helping Hand Development Center and the Special World Day Care Center, and an additional award of $50,000 for the violation of Amber's rights.

The federal district courts have split on whether the EAHCA provides a private right of action for damages. *Compare Monahan* v. *Nebraska*, 491 F.Supp. 1075, 1094 (D.Neb. 1980), *aff'd in part vacated in part* (8th Cir., April 1, 1981) *and Boxhall* v. *Sequoia Union High School District*, 464 F.Supp. 1104, 1112 (N.D.Cal. 1979) *with Miener* v. *Missouri*, 498 F.Supp. 944, 949 (E.D.Mo. 1980) *and Anderson* v. *Thompson*, 495 F.Supp. 1256, 1269 (E.D.Wis. 1980) *and Loughran* v. *Flanders*, 470 F.Supp. 110, 113-15 (D.Conn. 1979). The Act provides that the reviewing court may grant such relief as it

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not be required to exercise medical discretion in furnishing CIC. The latest consent form submitted by Amber's parents includes, at this court's request, her physician's statement on how Amber is to be catheterized and the precise times during the day she should be catheterized. The school district thus is relieved from having to exercise medical discretion.

[17] As for the school district's earlier suggestion that there has been no showing that the school district receives federal funds, the superintendent of the school district conceded that the school district receives federal funds allocated for special education.

determines to be appropriate. 20 U.S.C. § 1415(e)(2). Reimbursement for substitute educational services is consistent with the congressional purpose that handicapped children be furnished free appropriate education. *See Monahan* v. *Nebraska*, *supra*, at 1094. But the cost of recognizing a general right of recovery is that educational institutions may be inhibited from implementing new curricula and techniques for fear of exposure to liability. *See Loughran* v. *Flanders*, *supra*, at 115. Such a development could frustrate Congress' intent to expand and improve the education and related services available to handicapped children. *Id.* at 114. These concerns seem relevant to whether the relief would be appropriate. We do not here reach this question because the actual proved damages are of a different sort.

While plaintiffs occasionally have suggested that they are entitled to a wide range of compensatory damages, the only damages they were able to prove was the cost of sending Amber to the Helping Hand Development Center and the Special World Day Care Center. *See* page 4, *supra*. The issue here thus is not whether the EAHCA exposes school districts to open-ended tort liability, but whether school districts must reimburse parents of handicapped children for the cost of providing services the district was obligated to furnish but did not. In this regard, it is important to note that damages for such substitute services are only available where the child is applying for *initial admission*. Once the child is enrolled in a public school, the EAHCA requires the child to remain in its current educational placement pending EAHCA proceedings. 20 U.S.C. § 1415(e)(3); *see Stemple* v. *Board of Education*, 623 F.2d 893, 897-98 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3606 (1981). Thus, if the parents remove the child from school while proceedings are pending, they will not be reimbursed for the cost of providing appropriate private education. *See id.*

Where, however, as here, the parents cannot enroll the child without a risk of injury to the child because a school will not provide a required related service, appropriate relief ought to include the cost of alternative sources of education and ther-

apy. Such discretion on the part of the parents is implicit in the requirement of § 1415(e)(3) that the school district enroll the applicant in its school program *with the consent of the child's parents or guardians*. The school district, by reimbursing the parents, indirectly bears the cost it would have borne directly had it furnished the services it was obligated to provide. That is, the money "damages" reflect no more than a judicially compelled provision of the statutorily ordered free appropriate education. This relief seems to fall within the congressionally mandated duty to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). This court here expresses no opinion on whether a similar analysis is appropriate where parents can enroll their child in the school district's program without risk to the child's health.[18]

This court thus concludes that for the limited type of damages plaintiffs have proved, they are entitled to recover under the EAHCA. Their right to recover, of course, is qualified by their duty to mitigate.

Plaintiffs claim that they suffered damages of $444 per month while Amber was enrolled at the Development Center (September, 1979 through August, 1980),[19] and $45 per week plus $100 per month during the sixteen weeks Amber was at

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[18] Where the parents can enroll the child in the public school, and make private arrangements to remove the source of danger, under § 1415(e)(3) the school district may not be obligated to reimburse any more than the marginal cost of making its program acceptable. This, of course, simply restates plaintiffs' general duty to mitigate, discussed *infra*.

[19] Plaintiffs' out-of-pocket expenses were $191 per month. Under the collateral source rule, plaintiffs are entitled to the reasonable value of the services rendered by the Helping Hand Development Center even though most of the Center's expenses were paid by private charities. *See Restatement (Second) of Torts* § 921, comment c(3); *see generally* "Collateral Source Rule: Receipt of Public Relief or Gratuity As Affecting Recovery In Personal Injury Action," 77 A.L.R.3d 366 (1977).

the Day Care Center (September 1 through December 22, 1980). Plaintiffs' total claim up until this court's Interim Order thus is $6,419 plus attorneys' fees (*see* pages 31-35, *infra*).

The school district argues that even if plaintiffs are entitled to damages, they breached their duty to mitigate by not placing Amber in the chool district's Early Childhood Development Classes and privately arranging for CIC. The district also notes that plaintiffs' expenses were for full-day supervision, some of which would have been incurred even if Amber had attended the school district's half-day program.

Plaintiffs' burden includes proof that the asserted damages were proximately caused by the alleged injury. *See Prosser on Torts* 236-44 (4th ed. 1971). In this, plaintiffs' proof is less than adequate.

Plaintiffs imply that none of the costs of placing Amber inthe Helping Hand Development Center and the Special World Day Care Center would have been incurred had Amber been attending school. The evidence does not support their contention. As previously noted, Amber was scheduled to attend the school district's half-day program. Because both of Amber's parents are employed full time, it would have been necessary to arrange for supervision during the remainder of the day. Amber's parents thus would have had to arrange, at their own expense, for a day care center or a private babysitter for the period that Amber was not in school.[20] Indeed, a school district employee testified that many of the district's half-day pupils are bussed directly from school to their day care center or babysitter.

The school district notes that at least some of plaintiffs' expenses for outside supervision would have been incurred whether or not Amber had been placed with the school district.

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[20] Although the programs of the Development Center and Day Care Center are almost full-day, Amber apparently had a private babysitter for part of the late afternoon.

Plaintiffs offered no evidence from which this court can determine which of their expenses were incurred because of the school district's failure to provide CIC, and which would have been incurred under any circumstances.[21] It is plaintiffs' burden to show that their expenses are sufficiently related to the alleged injury that compensation is warranted. Here, on the basis of the record, any such determination is purely speculative, and cannot be made. Although plaintiffs presumably could have submitted evidence from which this court could calculate the damages proximately caused by the school district, they have not done so.

There is one exception to this analysis. Amber received physical therapy at the Helping Hand Development Center from September, 1979, through May, 1980, and September through December 22, 1980,[22] that would have been provided by the school district had Amber been able to attend the school district's half-day program. A reasonable value of $100 per month was placed on that service. Plaintiffs, therefore, are entitled to damages, not including attorneys' fees, of $1,271.

There is substantial merit to defendants' contention that plaintiffs failed to mitigate damages. A school district employee testified that she had recommended to Amber's parents that Amber be enrolled with the school district and that CIC privately be arranged pending the dispute's resolution. If the district lost, it would reimburse plaintiffs' expenses. Plaintiffs

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[21] Mary Tatro testified that she paid Amber's babysitter $15 to $25 per week. But the hours that Amber was placed with her babysitter appear to be far less than what would have been necessary had Amber been attending the school district's half-day program. Moreover, there was no evidence that such services would have been available, or that Amber would have been placed with a babysitter rather than in a day care center for that period.

[22] Amber also received such therapy from June through August, 1980. Amber's IEP did not, however, indicate that she would be receiving any therapy during the summer months, and there is no evidence that such would have been provided by the school district.

never satisfactorily explained why they chose to forego this option. Their failure to make such an arrangement is particularly disturbing in that plaintiffs arranged for Amber to be catheterized at school by her babysitter for over two months after this court had entered its Interim Order. See pages 4-5, *supra*. Plaintiffs introduced much evidence to show how simple a procedure CIC really is, and how quickly and safely it can be performed by a lay person with only an hour's training. Amber would have needed to be catheterized only once during her school day at some pre-arranged time. This court agrees with defendants that it would have been a reasonable and relatively simple solution for plaintiffs privately to have arranged for such a service.[23]

The burden of showing failure to minimize damages rests with the wrongdoer. *See Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 932 (5th Cir. 1979). The defendant must show that the failure was unreasonable and had the consequence of aggravating the harm. *Id.* Defendants have demonstrated the first element, but not the latter. The only evidence on what the cost of privately arranged CIC might have been is the value placed by Amber's babysitter on her own services. Amber's babysitter testified that although she did not charge plaintiffs for her trips to the school to catheterize Amber and did not expect any remuneration, she valued her services at ten dollars per trip. No foundation, however, was laid by plaintiffs to show that Amber's babysitter had sufficient personal knowledge to testify as to the reasonable value of catheterization services. But even accepting ten dollars per trip as the reasonable value of privately arranged catheterization, it is obvious that over the relevant period (September, 1979 through December, 1980), plaintiffs would have expended more than $1,271 in such services. Thus, plaintiffs' conduct

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[23] The victim of plaintiffs' failure to mitigate is Amber. A school district employee and Amber's physician testified that Amber would have benefited from attending the school district's Early Childhood Development Classes.

may have been unreasonable but it did not aggravate the harm (that is, at least not when measured in dollars and cents, *see* note 23, *supra*).[24]

Plaintiffs also request damages (the cost of providing CIC)[25] and attorneys' fees incurred after this court entered its Interim Order. As earlier discussed, after providing CIC for approximately a week, the school district discontinued catheterization because of plaintiffs' failure to submit a parental consent form and physician's prescription meeting the school district's requirements. The school district contends that plaintiffs were uncooperative and unreasonable,[26] while plaintiffs maintain that the school district was not entitled to the type of consent form and physician's prescription it had requested. From the evidence adduced at the March 13th and April 23rd hearings, this court finds that the school district's requested parental consent form and physician's prescription were reasonable. Although the final agreed to consent form and prescription are not identical to those originally requested by the school district, they meet many of the school district's requirements. In particular, this court believes that the school district's insistence that the prescription be written in a manner not requiring medical discretion on its part was a legitimate request and one plaintiffs should have complied with.

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[24] Alternatively, if the testimony of Amber's babysitter is considered nonprobative, defendants failed to meet their burden by not offering any evidence on the cost of catheterization services.

[25] Presumably, plaintiffs contend that under the collateral source rule they are entitled to the value of the services rendered by Amber's babysitter, even though they suffered no out-of-pocket expenses. *See* note 19, *supra*.

[26] The school district offered evidence showing that at the time it and plaintiffs were discussing the consent form and prescription, Mary Tatro was threatening officials of the district with additional lawsuits as well as requesting the Texas Medical Association to investigate the school district's medical consultant.

This court also notes that the school district never disavowed its duty to provide CIC under this court's Interim Order, and went to some length to accommodate plaintiffs. Because the school district violated no duty, plaintiffs are not for this reason entitled to damages and attorneys' fees incurred after this court's Interim Order. We turn to the more difficult question of whether attorney fees are recoverable at all.[27]

Attorneys' Fees

The EAHCA does not provide for an award of attorneys' fees, *see Anderson* v. *Thompson*, 495 F.Supp. 1256, 1268-70 (E.D.Wis. 1980); *see also Hines* v. *Pitt County Bd. of Educ.*, 497 F.Supp. 403, 409 (E.D.N.C. 1980), and they are not recoverable unless they may be awarded pursuant to 42 U.S.C. §§ 1983, 1988; *see Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980); *Maher* v. *Gagne*, 100 S.Ct. 2570 (1980), or 29 U.S.C. §§ 794, 794a(b).

Since passage of 42 U.S.C. § 1988 in 1976, courts may in their discretion allow a prevailing party a reasonable attorney's fee as part of the costs in actions or proceedings to enforce certain statutory provisions. One of the listed provisions is 42 U.S.C. § 1983, and the Tatros throughout this suit have argued that they were seeking relief under § 504 of the Rehabilitation Act and § 1983 as well as the EAHCA.

The Tatros can recover counsel fees only under three possible theories. First, it can be contended that an award of counsel fees is "appropriate relief" under 20 U.S.C. § 1415(e)(2). Second, it can be argued that this is an action to enforce rights under 42 U.S.C. § 1983, and that § 1988, therefore, authorizes an award of fees. Third, the Tatros may be entitled to attorneys' fees under 29 U.S.C. § 749a(b) (§ 505) from a State denial of rights under § 504.

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[27] No evidence was offered to sustain the prayed for $50,000. Plaintiffs have not shown any bad faith or malicious conduct on the part of any defendant.

Maine v. *Thiboutot*, 100 S.Ct. 2502 (1980) seemed to provide strong support for the attorney fee application under the second theory. In *Thiboutot* the Court held that the "and laws" language of § 1983 allowed a suit for a denial by *Maine* of benefits to which plaintiffs claimed entitlement under the federal Social Security Act. The Court also held that the "any action" language of § 1988 authorized an award of counsel fees for the suit. Three justices dissented, expressing concern over the apparent open-ended reasoning of the majority. The dissent, authored by Justice Powell, pointed out that the majority's construction creates rights of action under § 1983 for which there is no grant of federal jurisdiction. It reasoned that, contrary to the effect of the majority's holding, § 1983 has always been read to be coextensive with 28 U.S.C. § 1343(3) which supplies jurisdiction for claims involving rights secured by the Constitution or by any act of Congress providing for equal rights of citizens. In listing by illustration the possible rights of action created by the majority, the dissenting justices observed that the "only exception will be in cases where the governing statute provides an exclusive remedy for violations of its terms. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 150-151, n.5 (1970); *cf.*, *Great American Fed. S. & L. Assn.* v. *Novotny*, 442 U.S. 366 (1979)." *Id.* at 2513, n.11 (parallel citations omitted).

Assuming for now the EAHCA to be an act of Congress providing for equal rights of citizens within the meaning of § 1343(3), this court has jurisdiction over the § 1983 claim. *Cf.*, *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979). It appeared that *Thiboutot* answered the question before this court, despite the caveat implicit in the expressed unease of three justices. Recently, however, the three were joined by Stewart and Stevens in *Pennhurst State School and Hospital* v. *Halderman*, 49 U.S.L.W. 4363 (April 20, 1981) in casting doubt on such a sweeping construction of *Thiboutot*. In *Pennhurst*, the Court suggested two qualifications to a possible § 1983 application. First, the right claimed to be denied by the State must be a "right secured" by the laws of the United

States. Second, Justice Powell's footnote in the *Thiboutot* dissent regarding exclusivity of remedy, 100 S.Ct. 2513 n.11, gained majority support. Even Justice White's dissent in *Pennhurst* acknowledged that "Congress may explicitly direct otherwise such as if the 'governing statute provides an exclusive remedy for violation of its terms.' " *Id.* at 4376. This court will address these two inquiries first in determining the applicability of § 1983 to the EAHCA, and then will turn to § 504.

The right to a free appropriate education is plainly secured by the Act. The more difficult question is whether Congress intended the remedies it created to ensure such an education to be exclusive; that is, whether the EAHCA falls under the "Powell exception." Undoubtedly, Congress can, by express language, provide either that a created remedial scheme is or is not the only enforcement mechanism for a congressional enactment.

In addressing the applicability of § 1983 to the EAHCA, this court will first assume that compliance with the Act's remedial scheme is not held to be a prerequisite to federal suit. *See Patsy* v. *Florida Intern University*, 634 F.2d 900 (5th Cir. 1981) (*en banc*), and will then make the contrary assumption. This court proceeds in both directions because there is substantial disagreement among the Circuits as to the exhaustion requirement, and the Supreme Court has not yet decided the question. This court usually would stop with an *en banc* decision of the Fifth Circuit because it binds this court. Here, however, there is a Janus faced quality to the reliance in this case upon § 1983 to enforce rights secured by the EAHCA. Plaintiffs face a virtual conceptual "catch-22." A contention that the EAHCA may be enforced by § 1983 without exhausting the EAHCA remedies breathes life into the argument that its remedial scheme is exclusive. But, a concession that such exhaustion is a prerequisite breathes life into the argument that no action under § 1983 has been prosecuted; that its citation alone is insufficient to trigger § 1988.

Exclusivity Without Exhaustion

The difficult task is the inferring of intended exclusivity of remedy from the detail of the particular remedial scheme. Here, applying the standards set forth in the Court's recent opinions, such an inference is both plain and compelling.

In *Pennhurst*, the majority did not reach the question of § 1983 applicability, having concluded that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act conferred no substantive rights. Justice White, joined by Brennan and Marshall, reached a contrary conclusion and then faced the exclusivity issue. At the outset, the dissenting justices pointed to *Chapman* v. *Houston Welfare Rights Org.*, *supra*, for the proposition that "§ 1983 protections apply to all rights secured by federal statutes 'unless there is a clear indication in a particular statute that its remedial provisions are exclusive *or that for various other reasons a § 1983 action is inconsistent* with congressional intention.' " 49 U.S.L.W. at 4376 (emphasis added). The dissent reasoned that the creation of a federal agency to oversee a cooperative state-federal venture was not alone sufficient to infer that Congress intended the oversight to be exclusive. It then found language in § 6010's legislative history that Congress contemplated that the "rights" under § 6010 "should be protected and assured by the Congress and the courts." *Id.* at 4375-77. In sum, the dissenting justices found that *Thiboutot* "creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action." *Id.* at 4376.

The dissent's conclusion plowed no new ground. Where Congress has spoken explicitly, the Court has had little difficulty finding remedial exclusivity. *See Adickes* v. *S. H. Kress & Co.*, *supra*, (§ 1983 cannot supplement Title II, the Public Accommodation Provisions of the 1964 Civil Rights Act, 42 U.S.C. § 2000a). Where recognition of 42 U.S.C. § 1985(c), as supplementary to a detailed remedial scheme, would frustrate the scheme, the Court has found exclusivity. Thus, in *Great American Fed. S. & L. Assn.* v. *Novotny*, *supra*, the Court refused to allow prosecution under § 1985(c) of rights secured

by Title VII of the 1964 Civil Rights Act. The Court observed that § 1985(c) confers no substantive rights itself; that "[u]nder Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." *Id.* at 372-73. The Court pointed to the requirement that a complainant must first go to a State employment commission, to the conciliation processes, and to the time limits for the filing of claims. It also noted that the Act withholds resort to the courts until these processes are exhausted. Finally, it observed that Title VII has been judicially construed as not allowing general or punitive damages or jury trials. Permitting the case to proceed under § 1985 would allow a complaint to by-pass the administrative process. After gathering analogical support from *Brown* v. *GSA*, 425 U.S. 820 (1976) (holding § 717 of Title VII to be the exclusive federal remedy for employment discrimination claims of federal employees) the Court concluded that "[u]nimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a course of action under § 1985(c)." *Id.* at 378.

The EAHCA is not silent about either the judiciary's or the administering agency's roles in resolving disputes arising under its provisions. Section 1415 details procedures granting parents access to records, written notice to parents of proposed changes or refusals to change the placement of a child, opportunity to present complaints regarding the education, and an impartial due process hearing by the State educational agency. The statute provides that the hearings will allow participation of counsel, cross-examination, a right to a verbatim record and written findings. Only after administrative remedies have been exhausted may *de novo* review by State or federal court be sought. Although the reviewing court may take additional evidence, the statute provides that the court shall receive the records of the administrative proceedings. 20 U.S.C. § 1415(e)(2). Finally, the statute mandates the

preservation of the status quo during the pendency of any proceeding under the Act. *Id.* § 1415(e)(3).

Given this carefully constructed scheme, the teachings of *Novotny* and *Brown* compel the conclusion that it need not be eviscerated by tolerance of § 1983 suits. Section 1983 creates no substantive rights but is solely a procedural statute. *See Chapman* v. *Houston Welfare Rights Org.*, *supra*. It is illogical to conclude that Congress created an elaborate administrative review mechanism at local and State levels, yet, simultaneously, envisioned that anyone wishing to do so, could proceed directly to federal court. While the federal courts are given an important role by the EAHCA, it is not an open-ended responsibility. Their role is limited in two material ways. First, the federal judicial review is not available until after at least two levels of State administrative review have failed to adjust the dispute. Second, under this scheme, even if the dispute is not resolved at the administrative level, the reviewing court will have before it a fully developed administrative record, presumably reflecting the nuances of the decisions of the school and the parents. Section 1983, however, has no such constraints. Moreover, like Title VII, judicial decisions have limited the type of damages recoverable under the EAHCA. For example, there is no recovery of private tuition expenses for children withdrawn from school before completion of the review procedure. *See Stemple* v. *Board of Education*, *supra*. Recognizing a right of action under § 1983 for rights "secured" by the EAHCA would open the door to a range of damages unavailable under the EAHCA, and thereby undermine the entire analytical focus of granting relief as appropriate under the EAHCA. Finally, the status quo requirement of § 1415(e)(3) could be cast aside if relief became available under § 1983. In the words of the *Novotny* majority:

> Unimpaired effectiveness can be given to the plan put together by Congress [in the EAHCA] only by holding that deprivation of a right created by [the EAHCA] cannot be the basis for a course of action under [§ 1983]. *Id.* at 378.

Yet, the compelling force of *Novotny* and *Brown* is met head-on by *Thiboutot*. Plainly, the Social Security Act contains an elaborate internal remedial scheme. But the potential for its destruction by § 1983 enforcement was not discussed in *Thiboutot*, even by the dissent. It is difficult, if not impossible, to reconcile this aspect of *Thiboutot* with the Court's pronouncement in *Novotny* and *Brown*.

Exclusivity With Exhaustion

The disruptive consequences of recognizing a § 1983 suit are substantially reduced, if not eliminated, if exhaustion of EAHCA administrative remedies is a prerequisite to a § 1983 suit. In *Patsy* v. *Florida Intern University*, *supra*, the Court of Appeals held that exhaustion of administrative remedies would be required in appropriate cases. Because none of the four traditional exceptions to required exhaustion, as stated in *Patsy*, are present here, there appears to be no reason not to require exhaustion of remedies in compliance with EAHCA. *Id.* at 903-04. The EAHCA thus does not foreclose a § 1983 suit provided *Patsy* exhaustion is a prerequisite to suit.

But if exhaustion of administrative remedies is required under both the EAHCA and § 1983, and, all the proved damages are available under the EAHCA, there is the additional consideration that § 1983 serves no purpose other than that of a conduit for attorneys' fees. It appears that the Tatros, at least until this suit was filed, in no way relied upon a § 1983 claim, unless it is assumed that all of the activity before ARD Committee, the Impartial Due Process Hearing Officer and the administrative appeals were all § 1983 prosecutions because they were required exhaustion steps.

Whatever may be the role of § 1983 where the attack is upon the adequacy of procedures themselves, this court sees no role for § 1983 here. Where § 1983 has no greater role than the statute it purportedly "enforces," its citation will not trigger the § 1988 attorney fee provisions. Specifically, this was not "an action or proceeding to enforce a provision of [§ 1983]."

As Justice Powell noted in his *Thiboutot* dissent, "[t]he uses of this technique have not been explored fully." 100 S.Ct. at 2514. But this court has had experience in other contexts with multi-claim litigation where there is a statutory basis for counsel fees only for part of a claim. Whether the descriptive phase be "gravamen" or some other expression of predominance, this court sees no basis for awarding fees when the fee triggering statute plays no role but that of allowing attorney fees.

This court turns now to the question of whether § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 700, *et seq.*, secures a right enforceable either under § 1983 so as to allow recovery of § 1988 attorney fees or by an implied right of action under § 504 so as to allow recovery of fees under 29 U.S.C. § 794a(b).

With the EAHCA, our primary focus was upon remedial exclusivity, the second *Pennhurst* inquiry. That focus shifts here to the first inquiry, whether the general proscription of § 504 imposes an obligation upon Texas, enforceable by a Texas citizen—a question logically antecedent to whether there is an implied right of action or whether its "obligation" is enforceable by 42 U.S.C. § 1983.[28]

This question is controlled by *Pennhurst State School and Hospital* v. *Halderman*, *supra*, where the court construed the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010. The Court held that Congress must express clearly its intent to impose obligations upon the states when it acts under its spending power—"if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 4367. Because the lower courts had almost uniformly held that § 504 is enforceable by an implied right of action, and because the Congress, by passage of § 794a(b), authorized attorney fees, there has been little need

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[28] Therefore, this court will not dwell upon the relationship between § 1983 and § 504 in the context of attorney fees. If there is a right secured after *Pennhurst*, § 794a(b) explicitly authorizes attorney fees.

to press § 1983 as the procedural expression for § 504 violations. And in *Tatro* v. *Texas*, *supra*, the Court of Appeals found that the Tatros have rights secured under § 504 and an implied right to enforce them.

The Court in *Pennhurst* referred to § 504 in illustrating the failure of the lower court "to recognize the well-settled distinction between Congressional 'encouragement' of state programs and the imposition of binding obligations on the States." 49 U.S.L.W. at 4370. The Court continued:

> Relying on that distinction, this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by applicant's hearing disability. Finding that "state agencies such as *Southeastern* are only 'encouraged' . . . to adopt such policies and procedures,' " *Id.* at 410 (quoting the Act), we stressed that "Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.* at 411. Likewise in this case, Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.

Id.

This court makes no pretense that it comprehends the intended reach of the quoted language. In *Southeastern*, the Court expressly reserved the question of enforcement by an implied right or action under § 1983. 442 U.S. 397, 404 n.5.

The Circuit's holding in *Tatro* v. *Texas*, *supra*, is binding upon this court unless plainly undermined by the later decided *Pennhurst*. This court and the Court of Appeals obviously differ on the reach of *Southeastern*. Moreover, another panel of the Court of Appeals reached a result contrary to the view of this court in *Camenisch* v. *University of Texas*, 616 F.2d 127

(5th Cir. 1980), *vacated*, 49 U.S.L.W. 4468 (1981). The Supreme Court's remand of *Camenisch* left the question unresolved because it did not address the merits of the § 504 issues.

This court remains unconvinced as to the applicability of § 504; its views reinforced by *Pennhurst*. Yet, there is no intervening decision speaking with sufficient clarity to allow this court to take a course different from that of the Court of Appeals. This court's conscience is to follow the law; and *Camenisch* and *Tatro* are the law of this Circuit until they are overturned by the Supreme Court. For these reasons of institutional order, this court finds that 29 U.S.C. § 794a(b) authorize an award of reasonable attorney fees to plaintiffs. It turns now to their amount.

Awarded Attorneys' Fees

Plaintiffs request attorneys' fees of $30,000 and expenses of $2,314. Craig Enoch, attorney for plaintiffs, testified that approximately 334 hours of attorney time were devoted to this case up to the January trial. This court estimates that the trial necessitated an additional twelve hours.[29] Enoch also testified that 145 hours of law clerk time were used in preparation. Plaintiffs contend that the attorney time should be billed at $90 an hour, and the law clerk time at $45 an hour.

In determining a reasonable fee, this court looks to the twelve factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as further explicated in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575 (1980). Those factors are:

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

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[29] Enoch also testified that 64.4 hours were devoted to this case after this court entered its Interim Order. For the reasons stated above, no attorneys' fees will be awarded for those hours.

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

Johnson, at 717-19.

As noted in *Copper Liquor*, at 583, "recent decisions . . . suggest that district courts, in computing attorneys' fees, should pay special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation, and ability of counsel."

At the outset, it must be noted that Enoch is relatively inexperienced. At the time of the initiation of this dispute, Enoch had been practicing for approximately three and a half years, and had been a member of the federal bar for only two and a half of those years. During that time he had accumulated virtually no experience as a civil rights counsel, and had only limited experience in federal litigation. Although it is improper to penalize an attorney for his recent admission to the bar, *see Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 719, the *Johnson* factors nevertheless require this court to consider the experience, reputation, and ability of counsel.

Enoch testified that he believes $90 an hour to be a reasonable and customary fee. This court concurs that such an hourly rate is appropriate and reasonable for an attorney experienced in civil rights actions of this general nature. This court has reservations, however, at reimbursing a relatively inexperienced lawyer at such a rate.

Enoch submitted time records indicating the hours spent on briefing, trial preparation and other services. Upon reviewing those records, this court concludes that the time devoted by Enoch to this case was greater than that which would have ordinarily been required by an attorney with experience in civil rights and federal litigation.[30] As such, this court believes

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[30] The following items are illustrative of why this court believes the amount of billed time to be excessive: (1) From October 4 to October 12, 1980, plaintiffs' attorneys spent over seventeen hours preparing and filing the original complaint and request for injunctive relief. That document consists of little more than lengthy citations from the relevant statutes and a recitation of the essential facts. Plaintiffs at that time already had completed three levels of administrative review, and were intimately familiar with the facts and applicable law. (2) From October 24 to November 8, 1979, plaintiffs' attorneys needed approximately fourteen hours to prepare both a motion to amend the complaint and the amended complaint. The motion to amend, which cited virtually no law, and was two and a half pages long, requested this court to permit plaintiffs to join the Texas Education Agency, Commissioner Bowen, and the individual members of the involved Boards. The amended complaint was a duplicate of the original complaint, with the new parties "pasted in." (3) From December 3 to December 11, 1980, plaintiffs' attorneys required approximately six hours to prepare a six and half page memorandum in opposition to defendants' motions to dismiss. In that memorandum, almost half of which is quotations, plaintiffs cite a total of three federal district court decisions. Most of defendants' contentions already had been raised and briefed earlier in the litigation, and plaintiffs' response essentially was to reassert its previous arguments. In that regard, it is worthwhile noting that defendants did raise some issues—particularly the applicability of *Quern* v. *Jordan*, 440 U.S. 332 (1979)—to which plaintiffs simply did not respond. *See* Memorandum Opinion of December 31, 1980, pages 2-4.

that Enoch's request must be discounted by some factor that reflects his inexperience. Such a determination necessarily is somewhat arbitrary. But on the basis of Enoch's written submissions to and personal appearances before this court, it is this court's conclusion that an appropriate and reasonable hourly rate is in the area of $60 an hour. A contingency factor of 20% is reasonable, bringing the rate to $72 an hour. Multiplying that rate by the hours testified to, plaintiffs are entitled to reasonable attorneys' fees of $24,192.[31]

Plaintiffs' attorneys acknowledged at the trial that their time may appear excessive at first blush. They assert, however, that the complexity of the case required such an investment of time and effort. This court is acquainted with the legal and factual issues raised by this case. Factually, this case is not sufficiently complex to warrant the requested award. The record in this case is relatively straight-forward, and was developed early in the course of the administrative proceedings. With the exception of the permissible time interval between catheterizations, most of the facts necessary for granting injunctive relief were undisputed. Plaintiffs' attorneys are correct in noting that the legal issues here are both complex and novel. But this complexity was not reflected in plaintiffs' attorneys' work. Plaintiffs' attorneys' memoranda and oral arguments were of little assistance to this court in resolving the legal issues raised by this case. The number of hours devoted by plaintiffs' attorneys to this case thus appears to be less the product of any factual or legal complexity than the result of their relative inexperience. I intend no criticism of counsel for lack of experience; the question is compensation and experience is relevant.

Looking to the other *Johnson* criteria, this court finds that plaintiffs' attorneys were not prejudiced by having been pre-

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[31] Plaintiffs' attorneys have billed approximately ten hours spent deliberating with the press. As noted by plaintiffs' own expert witness, plaintiffs request to be reimbursed for this is inappropriate.

cluded from accepting more lucrative employment; that there were time limitations imposed by the circumstances, but that such limitations were not inordinately severe or unusual for federal litigation; that plaintiffs' attorneys do not have a reputation as experienced civil rights and federal litigator,[32] and that the case was not "undesirable." This court also determines that while the money involved here is not substantial, the awarded prospective relief is necessary for Amber's continued well-being. Taking all these factors into consideration, this court finds reasonable attorneys' fees to be $24,192.[33] In addition, plaintiffs will be awarded reasonable attorneys' expenses of $3,039.[34]

Judgment is by separate instrument filed herewith.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

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[32] Plaintiffs' attorneys initially were retained with regard to the administrative proceedings before the involved Texas agencies.

[33] This court awards an additional $7,200 (100 hours at $72 an hour) if this case is appealed to the Fifth Circuit by defendants.

[34] Considering that a not insubstantial portion of the clerk time was devoted to secretarial type duties rather than legal research, such time is reimbursed as an expense item at the rate at which the clerk was paid, five dollars an hour. *See generally Jones* v. *Armstrong Cork Co.*, 630 F.2d 324 (5th Cir. 1980) (may not bill paralegal time where most of time was in performance of clerical duties).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,
Plaintiffs,

v.

STATE OF TEXAS, et al.,
Defendants.

AMICUS CURIAE ADDRESSING QUESTIONS RAISED IN ORDER

TO THE HONORABLE UNITED STATES DISTRICT COURT:

As invited in this Court's Order of February 6, 1981, the Texas Medical Association and the Dallas County Medical Society respectfully submit this *Amicus Curiae* brief and request that it be considered by this Honorable Court.

STATEMENT OF INTEREST

The Texas Medical Association is a non-profit corporation organized under the laws of the State of Texas. Its membership consists of approximately 18,500 physicians. The Dallas County Medical Society is composed of physicians practicing in Dallas County, Texas. Its membership consists of approximately 3,000 members. Questions concerning the provision of medical care for patients in Texas by licensed physicians utilizing the skills of qualified nonphysicians are of major interest to these organizations and their members.

ARGUMENT AND AUTHORITIES

The questions raised in the Court's Order of February 6, 1981, are addressed in the sequence of their presentation in that Order.

> ***Question (1)(a).*** **Whether under the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, art. 4495, *et seq.* (Vernon 1978) employees of the school district can only provide CIC (the provision of CIC is described in the attached stipulation from the pretrial order in this case) if they are under the control and supervision of a licensed physician and what the training of such persons must be. These questions include the question of whether to furnish CIC without such supervision would be to engage in the unlawful practice of medicine. *Id.*, art. 4510, 4510a and 4510b. *See also*, art. 4518 V.A.T.S. and Op. Tex. Att. Gen. No. H-1295 (Dec. 28, 1978), H-395 (Sept. 9, 1974).**

Under Texas law, a person is regarded as practicing medicine if he (she) professes to be a physician or surgeon and diagnoses, treats, or offers to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or seeks to effect cures thereof; or does the above acts and charges therefor, directly or indirectly, money or other compensation. (*Tex. Rev. Civ. Stat.*, arts. 4510 and 4510a (Vernon 1976)).

Thus, a person professing to be a physician who treats another for a disease or disorder, such as neurogenic bladder dysfunction using clear intermittent catheterization (CIC), is practicing medicine and must have a license to do so under Texas law. Similarly, a person who treats another for a disease or disorder and charges for that treatment is also practicing medicine and must have a license to do so lawfully.

Both the Dallas County Medical Society and the Texas Medical Association respectfully submit that CIC should not be administered to a patient except when ordered by a physician. It is a treatment used for selected patients with myelodysplasia and neurogenic bladders. (Enrile and Crooks, "Clean Inter-

mittent Catheterization for Home Management in Children with Myclomeningocele," 19 *Clinical Pediatrics*, 743 (Nov. 1980)). Even though patients, parents, and others can be trained to perform the technical aspects of this treatment, this does not affect the judgment that CIC should be performed only under a physicians order. However, classification of CIC as the practice of medicine would not prevent the delegation of such a procedure by a physician to a nonphysician. The delegation of medical tasks by physicians to nonphysicians has been an accepted part of the practice of medicine for years. *Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123 (Tex. Civ. App. - Tyler 1978, writ ref'd n.r.e.).

The parties in this case appear to agree that CIC is a procedure which, if provided by school system personnel, would only be provided when prescribed or ordered by a physician. The debate appears to be centered on the fact that physicians can and do delegate this task to others. However, administering the treatment itself by a nonphysician under a physician's order is not the unlawful practice of medicine even if a charge is made for the treatment provided. If providing CIC is not considered to be the unlawful practice of medicine because it is a treatment which the physician can delegate to others, this does not mean that it is a treatment which need not be ordered by a physician. In Texas, a nurse or an unlicensed lay person may not lawfully decide that a treatment such as CIC is needed for a particular condition (diagnose), administer treatment, and "charge therefor, directly or indirectly, money or other compensation" without a physician's direction. (*Tex. Rev. Civ. Stat.*, arts. 4510, 4510a, 4510b (Vernon 1976)).

The definitions of the practice of medicine, nursing, and the other licensed health professions overlap to some extent. This overlapping creates the result that the same act when performed by a nurse under the direction of a physician is considered to be part of the practice of nursing and when performed by a physician is considered to be the practice of medicine.

The Texas Attorney General recognized this result in 1962 when he defined the practice of nursing prior to the inclusion of the definition of professional nursing in what is now commonly referred to as the "Nursing Practice Act," (*Tex. Rev. Civ. Stat. Ann.*, art. 4513 *et seq.* (Vernon 1976 and Vernon Supp. 1980-1981)). This definition formulated by the Attorney General included the following statement recognizing the delegation of medical tasks:

> "Generally speaking, the duty of the nurse is to carry out the medical treatment prescribed by a doctor for his patient." (Tex. Att. Gen. Op. No. WW-1403 (1962))

The practice of nursing is more precisely defined today. (*Tex. Rev. Civ. Stat. Ann.*, art. 4518, sec. 5, (Vernon Supp. 1980-1981)). The statutory definition includes:

> ". . . The administration of . . . treatments as prescribed by a licensed physician . . ."

Thus, nurses can lawfully perform medical functions delegated to them by physicians. When nurses do perform delegated medical tasks, they do so with the knowledge that administering these delegated treatments is part of the practice of nursing and recognized as such in the state statutes defining nursing practice. When performing CIC as ordered by a physician for a particular patient, the nurse is practicing nursing as it is contemplated in the statutes.

Question (1)(b). **The nature and extent of such supervision.**

Once a physician has determined that CIC or any other treatment modality is appropriate for his or her patient, the physician may delegate performance of part or all of the treatment to another. The physician continues to monitor the progress of the patient, making sure that the treatment is being properly performed and is progressing without complication. The treatment, whether performed by the physician, a nurse, a parent, or the patient, is a treatment ordered and monitored by the physician.

The extent of the supervision or control which is proper in cases where CIC is ordered must be determined by each physician in each case, taking into consideration (1) the needs and capabilities of the patient and (2) the training, experience and competence of the individual (parent, teacher, patient, or nurse) who will be monitoring or performing the procedure ordered by the physician. One thing is certain: a patient being provided CIC by nurses, school teachers, or others under a physician's orders will expect that the treatment provided will conform to the same standard of care as would apply if a physician were providing the treatment.

Concerning the physical location of the physician, the following statement made to the Attorney General by the Texas State Board of Medical Examiners in a 1973 Attorney General Opinion Request was referenced with approval in an Attorney General Opinion involving ambulance attendants not in the physical presence of a licensed physician.

> "Unlicensed persons could legally perform acts which would constitute the practice of medicine if such persons were under the reasonable control and supervision of a licensed physician," Tex. Att. Gen. Op. No. H-27 (April 12, 1973)

Several Attorney General Opinions have dealt with the meaning of such terms as "direct" and "on-site" supervision as those terms are used in describing the supervision required of the delegating physicians. Tex. Att. Gen. Op. Nos. C-795 (Dec. 30, 1966) and H-368 (Aug. 12, 1974). The degree of instruction or supervision by the physician was also discussed in a 1978 Attorney General Opinion addressing the scope of lawful practice by nurse midwives:

> "Thus, even if performing an episiotomy or making sutures were held to constitute medical treatment, a registered nurse could provide these services at the doctor's direction . . . The appropriate degree of instruction or supervision by the physician will vary with the nurse's experience and qualifications . . . These qualifications are relevant to a determination of the appropriate degree of

instruction and supervision to be provided by a physician. Tex. Att. Gen. Op. No. H-1293 (1978).

In the case of CIC, the technical aspects of the procedure are not complicated and can be performed successfully by children on themselves after appropriate training (boys by age 8 and girls by age 10). Wyndacle, Oosterlinck and De Sy, "Clean Intermittent Self-Catheterization in the Chronical Management of the Neurogenic Bladder," 6 *European Neurology* 107-110 (1980). Hannigan, in "Teaching Intermittent Self-Catheterization to Young Children with Myelodysplasia," 21 *Developmental Medicine and Child Neurology* 365-368 (1979), describes the successful training by nurses of several five year old children (one boy, three girls) to perform CIC on themselves. Of course, physician supervision and continuous monitoring by parents or nurses is vital to minimize the likelihood and severity of complications and to assure proper maintenance and sterilization of the equipment used.

CIC appears to be a procedure which can be safely performed while neither a physician or nurse is present. CIC can be done safely when a patient or other person is trained to perform it properly and is taught to recognize conditions which should be brought to the physician's attention.

Nonphysicians often care for patients under such circumstances. Even when relatively sophisticated treatment is being provided, nonphysicians are commonly placed in a role of deciding when a physician should be notified or when to institute treatment prescribed by a physician under standing medical orders written after the patient has been examined and diagnosed. The physician need not be present for every treatment ordered. The activities which commonly take place in a cardiac intensive care unit provide an illustrative example of such a situation. In an article by the present Assistant General Counsel of the American Medicial Association, the following is recorded:

> "When the nurse serves in the cardiac intensive care unit, she has the advantage of sophisticated equipment that extends her ability to make evaluations and improves the

> reliability of such evaluations. Her training may be more highly specialized for the tasks she performs in the unit than that of the average physician. When the nurse in the unit institutes treatment measures in emergency situations, she is instituting treatment prescribed by a physician in anticipation that such a contingency might arise." Anderson, "Orderly Transfer of Procedural Responsibilities from Medical to Nursing Practice," 5 *Nursing Clinics of North America* 311-319 at 318-319 (Jun. 1970).

The nurse is not unlawfully practicing medicine in the situation described above. He or she is instituting treatment prescribed under a contingency order and, no doubt, has been placed in that position of responsibility because of demonstrated training, experience, and competence. The same should be true for any nurse, parent, or teacher who performs the CIC for the child. Each should have the necessary training to perform the treatment safely, and to know when the physician should be called.

> ***Question 2.*** **The conditions under which CIC ought to be provided consistently with conservative and sound medical judgment including both technique and with training level of the person administering it.**

CIC should only be provided under the orders of directions of a licensed physician. Just as in any other treatment,

> ". . . a nurse should comprehend the cause and effect of any order a physician instructs to her execution. As nursing education and training have become more sophisticated, and as more medical acts have become technical in nature in that they are repetitive and are performed under controlled circumstances, physicians have delegated to nurses a greater variety of technical procedures. Today, nursing practice encompasses such procedures as the administration of injections intravenously and intramuscularly, the starting of blood transfusions, the performance of diagnostic procedures, and the utilization of complex mechanical devices in the performance of diagnostic and therapeutic procedures." Anderson, "Orderly Transfer of Procedural Responsibilities from Medical to Nursing Practice," 5 *Nursing Clinics of North America* 311-319 at 314 (June 1970).

The performance of procedures by nurses under a physician's order has been called ". . . dependent nursing functions (which) are those performed under the legal orders and direction or supervision of licensed physicians." (See Anderson *supra*, at 314). These functions can be distinguished from recognized independent nursing functions, that is, those performed by virtue of the nurse's education, training, and experience, and which properly reflect the nurse's independent judgment. Such functions might include:

> "(T)he evaluation of a patient's condition for the purpose of determining his ability to care for himself or his requirements for nursing or medical attendance; the observation and reporting of symptoms and reactions; and the application and execution of nursing techniques and procedures. (See Anderson, *supra*, at 314).

The Joint Commission on Accreditation of Hospitals offers a voluntary accreditation mechanism for hospitals which is recognized by the Medicare program for purposes of determining a hospital's eligibility for participation. (See Commerce Clearing House *Medicare and Medicaid Guide*, "Conditions of Participation for Hospitals," para 12,340 (Mar. 1979)). Thus, in the case of nurses performing dependent functions outside the hospital or nursing home setting, it may be helpful to review provisions of the Joint Commission on Accreditation of Hospitals (JCAH) *Accreditation Manual for Hospitals* (1981 Edition) relating to home health services.

The section on "Home Care Services," pp. 57-62 of the JCAH *Manual*, provides in part:

> "Each patient receiving home care services shall be under the care of a physician, and shall be informed as to the identity of the physician primarily responsible for his care. Upon referral to the home care program, each patient shall receive an initial evaluation by a physician or registered nurse acceptable to the home care program, to determine the appropriateness of the patient's health care needs for home care services . . . The provision of all nursing and other therapeutic services provided in the home shall be under the supervision of a physician or

registered nurse employed by the home care program. This individual or a similarly qualified designee shall be available during the operating hours of the program, and shall participate in activities relevant to the professional services provided to the patient, including the level of personnel required." (p. 58)

The JCAH *Manual* further provides that when services are to be provided by individuals or by a participating community agency on an hourly or per-visit basis, a written agreement must be prepared and must specify:

"• The services to be provided . . .

• The manner in which services shall be coordinated, supervised, and evaluated by the hospital-administered home care program and its staff;

• The role of the hospital, the participating community agency, and the responsible physician in the establishment of a patient care plan;

• A statement to the effect that the patient care plan will not be altered unilaterally;

• The submission, within one week after each service/visit, of appropriate documentation (such as progress notes) of services provided;

• The participation in case conferences . . .

• The term of the agreement or contract, and the basis for its termination or renewal." (pp. 58-59)

The JCAH *Manual* also provides that a director of the home health care program shall be designated. The director's responsibilities include written descriptions of the responsibility of physicians and other professionals in the delivery of health services. The JCAH *Manual* also states that:

"Home care services provided through the hospital shall be delivered by personnel who have qualifications and abilities equivalent to those of personnel providing comparable services in the hospital, regardless of whether they are employed by the hospital or assigned by participating community service agencies . . . When the services of volunteers, supportive personnel, or technical assistants

are to be employed in the provision of patient care services, such personnel shall be adequately trained and supervised, and their duties shall be specified in writing.

"The medical staff shall assure that the quality of care provided to home care patients is comparable to that provided to inpatients, ambulatory care patients, and emergency care patients. The medical staff may, consistent with hospital policy, designate one or more physicians to carry out this responsibility, or such responsibility may be a function of one of the committees of the medical staff. When the activites of a medical director employed by the home care program on a full-time or part-time basis include clinical responsibilities, he must have achieved and maintained medical staff membership through the same procedures provided for all medical staff members. Physician advice and/or consultation must be available to the home care program staff at all times. (pp. 59-60)

If a physician is not a member of the hospital's medical staff and requests the services provided by the home care program, a special procedure to credential that physician is provided, including a provision for evaluating the care provided to that physician's patients. (p. 60)

Written policies and procedures are required on the delegation of responsibility, as well as the "scope of services to be offered and the manner in which they are to be provided." (p. 60) These must be approved by the hospital's medical staff, administration, and governing body. (p. 60) A written patient care plan that conforms with the physician's orders must be developed for each patient, (p. 61) An "accurate medical record" shall be maintained which shall include progress notes including:

"a description of signs, symptoms; treatment, service, or medication rendered; patient reaction; any change in the patient's condition; and any patient/family instruction given." (p. 61)

Coordination and evaluation of patient services on a continuing basis are encouraged in this section. The "patient care plan" must be

> "reviewed and evaluated as often as the patient's condition required, but not less than once every 60 days." (p. 62)

Some of the extensive requirements which now exist for those hospitals seeking accreditation by the JCAH when they provide home care programs have been described. Should schools begin providing similar services under a physician's order, a similar mechanism will likely evolve. To assure that the treatment provided by the school will be provided safely, proper coordination of activities and delineation of responsibilities will be necessary. If history is any guide, should schools be required to provide treatment as ordered by a pupil's physician, the JCAH or some other accrediting body will be called upon to develop standards for administration of such treatment. These standards will then be recognized by Congress in legislation and will serve as a reference point for evaluating eligibility for federal funding.

> ***Question 3.*** **Any additional questions believed to be presented by this case that impact the practice of medicine or the medical community's role in providing children necessary maintenance while participating in their individual education program.**

One question presented by this case concerns the direction by a physician of an act to be performed by a nurse or another trained person. If the physician is providing instruction not to a particular individual, but to an unidentified person selected in an organized system such as exists in a hospital, nursing home, or other organized setting, such an instruction may be proper and consistent with Texas law. The physician may reasonably rely on an existing system to assure that only those who are capable of carrying out his instructions do so. In such a situation, the physician is not necessarily liable for the acts of those carrying out his directions if the person to whom responsibility is delegated is selected by another upon whose judgment the physician can reasonably rely.

In an Amarillo case, a sponge had been left in the abdominal cavity of a patient during surgery. The patient sued the surgeon and the hospital which employed the nurses involved in the procedure.

The jury's verdict absolved the operating surgeon of any negligence of his own. The jury did find negligence on the part of the operating room nurses who were hospital employees, but declined to find that these employees were "borrowed servants" of the surgeon. On this verdict the trial court rendered judgment against the hospital only, not against the surgeon.

The Amarillo Court of Civil Appeals, in reviewing the trial court decision, reversed the judgment of the trial court and held the surgeon liable for the nurses' negligence under the "captain of the ship" doctrine. (*Worley Hospital* v. *Caldwell*, 529 S.W.2d 639 (Amarillo Civ. App. 1975)). On appeal the Texas Supreme Court set aside the Ararillo appeals court's judgment and remanded the case back to that court. (*Sparger* v. *Worley Hospital*, 547 S.W.2d 582 (Tex. 1977)).

The Texas Supreme Court noted that an employee of one employer may be the borrowed servant of another under Texas law. (See *Sparger* v. *Worley Hospital*, *supra*, at 583). The right to control is ordinarily a question of fact for the jury to decide. In this case the Supreme Court concluded that physicians should be subject to the usual rules applicable to borrowed servants. It held that the heavy burden of vicarious liability imposed by the "captain of the ship" doctrine as it has come to be applied in professional liability actions should no longer be applied in Texas. (*Sparger* v. *Worley Hospital*, *supra*, at 585).

The Supreme Court mentioned that in this case the nurses were assigned to the operating room by the hospital, their employer. The duties of the nurses were detailed in the hospi-

tal's Policy and Procedures Manual. Specific duties were assigned by the hospital to each nurse:

> "The procedures for the sponge count were intended for use regardless of the surgeon who was to perform the operation . . ." *Sparger* v. *Worley Hospital*, *supra*, at 586).

The physician was "in charge, medically speaking, of the nurses" (*Worley Hospital* v. *Caldwell*, 552 S.W.2d 534 at 535 (Tex. Civ. App. - Amarillo 1977)). Testimony at trial demonstrated that the physician had the right to control the nurses assigned to the operating room and in fact did direct them to take a second sponge count as the wound was being closed. (See Justice Johnson's opinion, dissenting from the opinion of the Supreme Court, 547 S.W. at 586-589). However, this degree of control did not persuade the appeals court on remand that the jury's refusal to find that the nurses were the borrowed employees of the doctor was against the great and overwhelming weight of the evidence. (*Worley Hospital* v. *Caldwell*, *supra*, 552 S.W.2d at 536).

The Texas Supreme Court in this case found that this physician was not necessarily liable for the acts of those who are selected by another person when those acts are performed under his direction for his patient. The right of the hospital to assign their employed nurses and determine their qualifications was not questioned.

Thus, a home health care agency, nursing home, or hospital with an estabished system to assign qualified persons to carry out a physician's instructions can properly select the agent to carry out the orders of a physician. However, when no such system exists, the physician may be held to have improperly delegated a treatment unless he selects specific individuals to carry out his treatment orders.

On November 21, 1980, an Attorney General Opinion was issued addressing the delegation of functions by a physician to an optician outside the physician's office. (Tex. Att. Gen. Op. No. MW-275 (Nov. 21, 1980)). The Attorney General opined

that a physician's orders in such a situation must be directed to a particular optician or opticians and cannot lawfully be delegated to an unnamed optician of the patient's choice. The Attorney General reasoned:

> "Where a physician delegates a medical task to another person, he must provide adequate instruction consistent with that person's skill and knowledge . . . Since opticians are not licensed in Texas, he (the physician) cannot rely on a particular level of ability in the profession." (p. 2)

The Opinion also states that the delegation by a physician must be to a natural person, not to a corporation or other group since:

> ". . . only natural persons can be subject to the control or supervision of the physician." (p. 3)

The Opinion concludes that the physician is legally liable for the negligence of the optician in performing services under his direction.

However, in this case the Attorney General was faced with a fact situation of unlicensed opticians in Texas. Since no particular minimum level of ability of these unlicensed persons exists, the Attorney General could only conclude that the physician must delegate to a particular optician or opticians, and provide instructions appropriate to the ability of particular persons. Therefore, although this Attorney General Opinion concluded that physicians can only delegate properly to designated natural persons in the fact situation before him, there is no reason to believe that the Attorney General intended to suggest a change in the common practice of delegation to undesignated nurses and others in hospitals, skilled nursing homes, and home health care agencies. These individuals typically are assigned duties by the organizations which employ them under systems designed to assure that only competent persons carry out any physician's order.

If an institution such as a school has no system to assure that only qualified individuals will carry out a physician's order, we respectfully submit that the physician would be required to

tailor his instructions to the individual who would carry them out just as the Attorney General concluded in MW-275, *supra*. The physician would need to satisfy himself that the individual who is to perform the task would be qualified to do so and that his instructions were sufficient to match the individual's training. On the other hand, if the school has in place of a mechanism to assure safe delivery of the treatment prescribed and proper coordination of activities and responsibilities such as is described in the JCAH *Accreditation Manual for Hospitals* (1981) for home health services, the physician would be able to reasonably rely on the mechanism available and could tailor his instructions to a pre-established level of training for a person to be designated by the school system.

CONCLUSION

All parties in this litigation appear to support the view that diagnosing a patient's condition and concluding that CIC treatment is appropriate are functions which only licensed physicians should perform. The Texas statutes support this view. However, consistent with this view is the accepted practice in Texas of nonphysicians performing acts which, if performed independent of a physician, would constitute the unlawful practice of medicine, but when performed under a physician's direction, are considered to be lawful and proper.

The extent to which a physician may properly delegate medical treatment to a nonphysician is conditioned in each case by the needs of the patient and by the experience and training of the nonphysician to perform the functions delegated. The Nursing Practice Act contemplates such a delegation of dependent nursing functions. The physician need not be physically present during administration of all treatments. The physician should, however, monitor the treatment rendered even though some of the treatment might be simple enough that children can perform certain technical aspects on themselves. The potential for harm, should all the steps in treatment not be adhered to or should an adverse reaction occur, warrants overall physician supervision of the treatment provided.

If a school system undertakes to provide CIC to its pupils under a physician's supervision, the responsibility for daily administration of CIC treatment will be delegated by the physician either (1) to persons the physician reasonably believes are capable of discharging them in a competent manner, or (2) to an organization which has in place a mechanism to assure safe delivery of the treatment prescribed. In either case, the physician would tailor his instructions to the individual providing the care or would write orders for those selected by the school system to provide the treatment based on a pre-established level of training for those individuals.

DALLAS COUNTY MEDICAL SOCIETY AND
TEXAS MEDICAL ASSOCIATION

/s/ By Durwood E. Neal, M.D.
DURWOOD E. NEAL M.D., President
Texas Medical Association

/s/ By Joseph C. Ogle, M.D.
JOSEPH C. OGLE, M.D., President
Dallas County Medical Society

/s/ By Richard Gray, Jr.
RICHARD GRAY, JR.
THOMPSON AND KNIGHT

/s/ By Donald P. Wilcox
DONALD P. WILCOX, General Counsel
Texas Medical Association

/s/ By Michael G. Young
MICHAEL G. YOUNG, Staff Attorney
Texas Medical Association

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 26 1981
JOSEPH VICEROY, JR, CLERK

By ????
Deputy

JUDGMENT

In accordance with the accompanying Memorandum Opinion, it is ORDERED, ADJUDGED AND DECREED that the State Board of Education and the Irving Independent School District modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization in accordance with and as prescribed by a valid medical prescription provided by Amber Tatro. It also is ORDERED, ADJUDGED AND DECREED that plaintiffs recover of the Irving Independent School District their damages and reasonable attorneys' fees and expenses in the sum of

$28,502, plus interest on such sum from the date of judgment until finally paid at the rate of 9% per annum. Court costs are taxed against defendants.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

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Deputy

MEMORANDUM OPINION

Defendant Irving Independent School District ("school district") has moved to amend the Memorandum Opinion and Judgment entered May 26, 1981. Upon reviewing the motion, this court makes the following amendments. The motion is DENIED in all other respects.

I.

This court finds that of the 336 billable hours devoted to this case by plaintiff's counsel, 62 hours were devoted to the administrative proceedings provided by defendants pursuant to 20

U.S.C. § 1415, and 33.6 hours were devoted to the issue of compensatory damages.[1]

II.

The school district asks this court to hold the State Board of Education liable for plaintiffs' damages and attorneys' fees. As explained in the Memorandum Opinions of December 31, 1980, and May 26, 1981, the Eleventh Amendment immunity of the State Board of Education precludes any award of compensatory damages. The immunity is not applicable, of course, to reasonable attorneys' fees awarded pursuant to 28 U.S.C. § 1988. *See Familias Unidas* v. *Briscoe*, 619 F.2d 391, 406 (5th Cir. 1980). This court did not, however, award attorneys' fees under § 1988, to which it held plaintiffs to be unentitled, but awarded the fees under § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a.[2]

This court held in its Memorandum Opinion of December 31, 1980, that § 504 of the Rehabilitation Act does not abrogate the Eleventh Amendment immunity of the States. *See Jones* v. *Illinois Dep't of Rehabilitation Services*, 504 F.Supp. 1244, 1257-58 (N.D. Ill. 1981); *Stubbs* v. *Kline*, 463 F.Supp. 110, 115-16 (W.D. Pa. 1976); *cf.*, *Quern* v. *Jordan*, 440 U.S. 332 (1979). The question to be answered here is whether § 505 abrogates that immunity as to attorneys' fees.

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[1] Plaintiffs' counsel testified that *no more than* 10% of his time was devoted to compensatory damages. This court construes his testimony as stating that approximately 10% of his total billable hours (336 hours) was devoted to compensatory damages. If this court's construction is incorrect, plaintiffs' counsel is to file an appropriate affidavit within ten (10) days of this Opinion.

[2] The section provides in pertinent part:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

29 U.S.C. § 794a(b).

The starting point of any analysis of the applicability of the Eleventh Amendment immunity to attorneys' fees provisions is *Hutto* v. *Finney*, 437 U.S. 677 (1978). In *Hutto*, the Supreme Court held that States cannot assert the Eleventh Amendment to defeat the attorneys' fees provision of 42 U.S.C. § 1988. The Court's reasoning rested on two pillars.[3] First, the Court noted that § 1988 imposes attorneys' fees "as part of the costs." *Id.* at 695. Costs can be taxed against a State regardless of its immunity. *Id.* at 696-97. The Court concluded that by authorizing attorneys' fees as an item of cost, Congress brought attorneys' fees under the judicially created "litigation costs" exemption to the Eleventh Amendment. *Id.* at 697-98.[4]

The second pillar was Congress' intent that the States be subject to the attorneys' fees provision. *Id.* at 694, 698 n.31. As noted by the Court, "Congress considered and firmly rejected the suggestion that States should be immune from fee awards." *Id.* at 698 n.31.

Over time, it is the second pillar—the existence of congressional intent to subject the States to § 1988 attorneys' fees awards—that appears to have become the primary analytical foundation laid by *Hutto*. Thus, in *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 737-39 (1980), the Court held that although Congress intended to abrogate the Eleventh Amendment immunity, there was no similar indication that Congress intended § 1988 to overcome

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[3] The State defendants did not act in bad faith or violate a judicial decree. The portion of *Hutto* upholding an award of attorneys' fees as "ancillary" remedial relief, therefore, is inapplicable to this case. *See* 437 U.S. at 698-93.

[4] As this court reads *Hutto*, the authority to tax costs against State litigants derives from some sort of inherent constitutional power of the federal judiciary that may be redefined or even eliminated by Congress. 437 U.S. 695-98. The Court was somewhat equivocal, however, on precisely where it found this power. *Id.* at 696 n.25 (citing § 254 of the Judicial Code); *see also* 28 U.S.C. §§ 1911, 1913, 1920.

legislative immunity. The Court made no mention of the alternative holding in *Hutto* that attorneys' fees are part of recoverable costs. *See also New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980). In *Maher* v. *Gagne*, 448 U.S. 122 (1980), the Court was faced with the issue of whether attorneys' fees may be awarded pursuant § 1988 for a purely statutory, non-civil-rights violation. *Id.* at 130-33. The Court did not, however, reach the question. It held that although no constitutional violation had been found, because the plaintiffs' *allegation* of a Fourteenth Amendment violation had been sufficiently colorable to maintain federal jurisdiction, the awarded fees fell within Congress' § 5 power to enforce the guarantees of the Fourteenth Amendment. *Id.* Only in footnote did the Court mention that Congress may define "costs" to include reasonable attorneys' fees. *Id.* at 131 n.14; *see also Maine* v. *Thiboutot*, 488 U.S. 1, 9 n.7 (1980). Similarly, in *Familias Unidas* v. *Briscoe*, *supra*, at 406, the Fifth Circuit, in explaining why the Eleventh Amendment does not bar an award of § 1988 attorneys' fees against the Texas State Board of Education, cited *Hutto* for the proposition that Congress abrogated the immunity pursuant to its plenary powers under § 5 of the Fourteenth Amendment. As in *Supreme Court of Virginia*, no mention was made of Congress' redfinition of recoverable costs. In *Corpus* v. *Estelle*, 605 F.2d 175 (5th Cir. 1979), in holding that the Eleventh Amendment waiver applies to cases pending at the time § 1988 was enacted, the Circuit propounded at some length on Congress intent to abrogate the immunity, with virtually no discussion of Congress' power to define taxable costs.

Unlike § 1988, it is not at all clear that Congress focused directly on the question of State liability when it enacted § 505 of the Rehabilitation Act, or that it firmly rejected a suggestion that States should be immune from fee awards. None of the three Committee Reports make any direct reference to State immunity. *See S. Rep. No.* 95-950, 95th Cong., 2d Sess. 18-20 (1978); *H. R. Rep. No.* 95-1149, 95th Cong., 2d Sess. 21 (1978); *H. R. Rep. No.* 95-1780 (Conferences Report), 95th

Cong., 2d Sess. 93 (1978) (latter two Reports reprinted in [1978] *U.S. Code Cong. & Ad. News* 7312). That is not to say, however, that there is no indication of congressional intent. In giving his understanding of the attorneys' fees provision in the Senate bill, Senator Cranston made the following remark:

> [W]ith respect to State and local bodies, or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government—regardless of whether the such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to enforce title V is within the power of Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in *Hutto* v. *Finney*, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or change a violation under title V of the Rehabilitation Act of 1973.

124 *Cong. Rec.* S15,591 (daily ed. Sept. 20, 1978). These sentiments were echoed by Senator Stafford, ranking member of the Senate Subcommittee on the Handicapped and chief cosponsor of the Senate bill, in his discussion of the Conference bill. 124 *Cong. Rec.* S19,000 (daily ed. October 14, 1978).

A court may not conclude that Congress intended to abrogate the State's Eleventh Amendment immunity unless it finds a clear statement of legislative intent to that effect. *See Quern* v. *Jordan*, *supra*, at 340-45. These remarks by two Senators, isolated from any real debate on the issue, do not, by themselves, meet that test. But in the context of *Hutto* v. *Finney*, *supra*, and with the presumption that Congress understood the significance of its languge when it made the award of reasonable attorneys' fees a part of recoverable costs, this

court concludes that the Eleventh Amendment does not bar a § 505 award of attorneys' fees against State defendants.[5]

In that plaintiffs obtained injunctive relief against the State Board of Education, the Judgment will be amended to make the Board jointly and severally liable for plaintiffs' reasonable attorneys' fees.

III.

The school district suggests in its motion that plaintiffs did not establish a § 504 violation because they failed to show that Amber Tatro was excluded from a school district program or activity receiving federal financial assistance. *See Brown* v. *Sibley*, 650 F.2d 760, 766-71 (5th Cir. 1981).

As this court noted in its earlier Memorandum Opinion:

> As for the school district's earlier suggestion that there has been no showing that the school district receives federal funds, the superintendent of the school district

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[5] From time to time, the State Board of Education has contended that it enjoys an absolute judicial or legislative immunity. Arguably, if such immunity exists, the Board may be immune from attorneys' fees awards. *See Supreme Court of Virginia* v. *Consumers Union of the United States, Inc., supra*, at 737-39. But as this court noted in its earlier Memorandum Opinion, the State Board of Education is under a statutory obligation to supervise Amber's Individual Education Program. 516 F.Supp. at 972; *See S-1* v. *Turlington*, 635 F.2d 342, 350 (5th Cir. 1981); *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 696-98 (3d Cir. 1981). In this regard, the Board's role is akin to that of an administrative agency charged with enforcing a statute. As the Supreme Court noted in *Supreme Court of Virginia*, "[f]ee awards against enforcement officials are run-of-the-mill occurrences." 446 U.S. at 739. This court does not, however, hold that the State Board of Education is never entitled to legislative or judicial immunity. It only holds that the awarded injunctive relief goes to the Board's "direct enforcement role," *see id.*, and that the Board thus is unentitled to any judicial or legislative immunity as to the duty it here owes Amber Tatro.

conceded that the school district receives federal funds allocated for special education. 516 F.Supp. at 977, n.17.

This court has reviewed the transcript, and is persuaded that superintendent Townley conceded that the school district receives federal financial assistance for special education.[6] As the record stands, plaintiffs have met their burden of proof. But because Townley's concession arguably is somewhat ambiguous, in the interests of justice this court will consider reopening the record as to the issue if within ten (10) days of this Opinion the school district files an affidavit setting forth the federal funds received and the programs and activities on which such funds are spent. The affidavit is to be accompanied by a legal memorandum dealing with what constitutes a "program or activity" within the meaning of § 504. *See generally Brown* v. *Sibley, supra.*[7]

IV.

An Amended Judgment reflecting this court's amended findings and conclusions is filed herewith by separate instrument.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

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[6] The school district appears to assume that plaintiffs must show that federal funds are allocated specifically for the school district's Early Childhood Development Program. All plaintiffs must show is that Amber was excluded from *any* program or activity receiving federal financial assistance. In this regard, had Amber been enrolled by the school district she would have been entitled to participate in the school district's physical therapy program. *See* 516 F.Supp. at 979. Physical therapy is a type of "special education."

[7] Specifically, the school district is to address the issue of the administrative level at which such funds must be allocated before a person is excluded from a "program or activity." That is, if the school district receives federal financial assistance, is every program or activity provided by the school district a § 504 "program or activity," or must the funds be targeted to the precise types of education Amber would have received by attending the school district?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH VICEROY, JR. CLERK
By ????????
Deputy

AMENDED JUDGMENT

It is ORDERED, ADJUDGED AND DECREED that the State Board of Education and the Irving Independent School District modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization in accordance with and as prescribed by a valid medical precription provided by Amber Tatro. It also is ORDERED, ANJUDGED AND DECREED that plaintiffs recover of the Irving Independent School District their damages in the sum of $1,271, and of the Irving Independent School District and the State Board of Education, jointly and severally, their reasonable attorney's fees and expenses in the sum of

$27,231, plus interest on such sums from May 26, 1981, until finally paid at the rate of 9% per annum. Court costs are taxed against defendants.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.
April 25, 1983.

NO. 81-1454.

Henri and Mary TATRO, Individually,
and as Next Friend of Amber Tatro, A Minor,
Plaintiffs-Appellees, Cross-Appellants,
v.

The STATE OF TEXAS, *et al.*,
Defendants,

State Board of Education,
Defendant-Appellant,

The Irving Independent School District,
Defendant-Appellant, Cross-Appellee.

Parents of handicapped child brought action seeking injunction requiring school district to provide child with special services and to recover compensatory damages and attorney fees. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 481 F.Supp. 1224, denied preliminary injunction and appeal was taken. The Court of Appeals, 625 F.2d 557, vacated and remanded. On remand, United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 516 F.Supp. 968, entered injunction requiring school district to provide child with requested special services and authorized award of reasonable attorney fees to parents, and school board appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) clean intermittent catheterization required for handicapped child was "related service" within meaning of Education of All Handicapped Children Act; (2) school district was required to provide handicapped child with clean intermittent catheterization;

(3) injunction requiring state board to act in supervisory capacity to assure that handicapped child's individual education program conformed to Act was proper; and (4) state board's violation of Rehabilitation Act supported award of attorney fees.

Affirmed.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and JOLLY, Circuit Judges.

GEE, Circuit Judge:

This is Amber Tatro's second appearance before this court. The facts and procedural history of her case are reported in detail in our prior opinion, 625 F.2d 557 (1980) *(Tatro I)*, and in those of the district court. 516 F.Supp. 968 (1981); 481 F.Supp. 1224 (1979). To aid the reader, we will briefly summarize them here. Amber is a seven year old girl afflicted with myelomeningocele, a birth defect commonly known as spina bifida. As a result of this handicap, she suffers from speech and orthopedic impediments and a neurogenic bladder. Because this last condition prevents voluntary emptying of the bladder, Amber must be catheterized several times daily to prevent injury to her health. The method chosen by Amber's doctors, the most widely accepted procedure, is Clean Intermittent Catheterization ("CIC").

In early 1979, when Amber was three and one-half years old, her mother asked the Irving Independent School District ("school district") to provide special education for Amber. The school district agreed, and in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber as required by the Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. §§ 1401(19), 1414(a)(5) (1976). The IEP provided for Amber's placement in the school district's Early Childhood Development ("ECD") classes and for the provision of various other services to Amber, including physical and occupational therapy. The IEP did not provide for

CIC and the school district maintained that it had no legal obligation to administer it.

Amber's parents next pursued an administrative appeal from the school district's decision not to provide CIC. *See* 20 U.S.C. § 1415 (1976) (setting out procedures). Pursuant to 20 U.S.C. § 1415(b)(2), an impartial hearing officer conducted a hearing and determined that the EAHCA required the school district to provide CIC. The Texas Commissioner of Education adopted the hearing officer's decision. *Amber T., bnf Mary T. v. Irving Independent School District*, TEA Docket No. 115-SE-579 (August 6, 1979). The Texas State Board of Education ("State Board") reversed the decision of the Commissioner and hearing officer and reinstated the school board's decision not to provide CIC. After thus exhausting state remedies as required by the EAHCA, the Tatros brought the present action in federal district court pursuant to 20 U.S.C. § 1416(e)(2) (1976), naming the school board, the State Board, and others as defendants.[1]

The Tatros contended that the school district violated the EAHCA by failing to provide Amber with a "free appropriate public education," *id.* § 1412(1), which is defined in part as "special education and related services." *Id.* § 1401(18). Specifically, they argued that CIC is a "related service" the state must provide to fulfill its duty to Amber under the EAHCA. The Tatros also argued that the school district's refusal to provide CIC violated section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the handicapped in federally funded programs. 29 U.S.C. § 794 (Supp. V 1981).

The district court denied the Tatros' motion for a preliminary injunction to require the school board to provide CIC. 481 F.Supp. at 1229. That court concluded that CIC is not a "re-

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[1] All defendants save the school board and the State Board were dismissed by the district court, 516 F.Supp. at 972-73; the Tatros do not contest these dismissals. The propriety of the State Board's action is discussed in Part III, *infra*.

lated service" within the meaning of the EAHCA because the need for it does not arise from the effort to educate *Id.* at 1227. The district court further concluded that section 504's prohibition of discrimination does not impose a duty upon the school board to take affirmative action such as the provision of CIC. *Id.* at 1228-29.

The Tatros appealed from the district court's order, and based upon facts that were assumed for purposes of the appeal, this court reversed. *Tatro I*, 624 F.2d at 558 n. 1, 562. This court held that CIC falls within the literal terms of the statutory definition of "related services," which includes "supportive services . . . as may be required to assist a handicapped child to benefit from special education." *Id.* at 564 (citing 20 U.S.C. § 1401(17) (1976)). Because, under the assumed facts, Amber would be unable to attend ECD classes without provision of CIC during the school day, this court concluded that CIC was essential if she was to benefit from special education, and that CIC was therefore a "related service" in her case. The district court had thought it necessary to limit the statutory language to services arising from the effort to educate in the absence of any evidence of Congressional intent to require provision of life support services through and education statute. 481 F.Supp. at 1227. This court concluded that the district court's limiting construction of the EAHCA's literal language was erroneous because the EAHCA contained its own limitations on the types of life support services falling within the ambit of "related services." 625 F.2d at 562. This court further held that the school district's refusal to provide CIC violated section 504.

I. THE EAHCA CLAIM

Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's educational program. Nevertheless, *Tatro I* is the authoritative interpretation of the EAHCA in this circuit, and under "law of the case" principles, must be followed by us in this

subsequent appeal "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," *White* v. *Murtha*, 377 F.2d 428, 432 (5th Cir.1967) (footnote omitted; enumeration added); *see Goodpasture, Inc.* v. *M/V Pollux*, 688 F.2d 1003, 1005-06 (5th Cir.1982); *United States* v. *McClain*, 593 F.2d 593 F.2d 658, 664 (5th Cir.), *cert. denied* 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979). None of these considerations justifies departure from *Tatro I* by this panel.

Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well-documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute. It is not clearly erroneous and certainly does not work manifest injustice. Further, neither the parties' briefs nor our own research has revealed any supervening authority.[2] Thus, the only remaining issue under the EAHCA in this case is whether the evidence adduced on remand from *Tatro I* is so different from the assumed factual basis for that decision that its legal conclusions no longer apply. The school district argues that such is the case.

Tatro I did not hold that all life support services are "related services" under the EAHCA, nor that school districts must

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[2] The school district argues that after *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), federal statutes that grant funds to state programs cannot be read to confer judicially enforceable substantive rights on the programs' beneficiaries. This argument misreads *Pennhurst*, which only requires that funding statutes must by their terms create such rights. That the EAHCA creates enforceable rights to "special education and related services" was clearly established in *Board of Education* v. *Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3048-49, 73 L.Ed.2d 690 (1982). The issue in the present case is the scope of those rights.

always provide CIC to children who need it. Derived from the statute and its regulations were three conditions that must obtain before a school board must provide services such as CIC:

> first in order to be entitled to any related services at all, a child must be handicapped so as to require special education. 45 C.F.R. § 121a.14 (1979) (comment one); *see* 20 U.S.C.A. § 1401(1). . . . Second, the life support service must be necessary to aid a handicapped child to benefit from the special education to be provided. *See id.* § 1401(17). Thus, a life support service would not be a related service if it did not have to be provided during school hours, but instead could be performed at some other time. Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 45 C.F.R. § 121a.13(b)(10) (1979). Excluded from the term "related services" are those health-related activities which must be performed by a licensed physician that are not provided "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* § 121a.13(4). Thus, even under a literal interpretation of the statutory definition, the types of life support services needed by a child which can be related services are limited.

625 F.2d at 562-63 (footnotes omitted).

All parties agree that Amber is handicapped and in need of special education. The school district argues that the district court erred in finding the other two *Tatro I* conditions met in this case. It is argued first that under Texas law, CIC may not be performed by a nurse or other qualified person unless a physician is physically present to control and supervise the procedure. The argument concludes that such participation by a physician transforms CIC into "medical treatment" which the school district need not provide under *Tatro I*. *Id.* at 563; 20 U.S.C. § 1401(17) (1976) (medical treatment is a related service only if provided for diagnostic and evaluation purposes). The district court, guided by its extensive experience in apply-

ing Texas law, and with the aid of able amicus curiae,[3] rejected the school district's view of state law. 516 F.Supp. at 975-76. We cannot say that the district court was wrong.

As the district court found, it has been long settled that physicians in Texas may prescribe treatment and delegate its administration to others. *Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123, 129-30 (Tex.Civ.App.—Tyler 1978, writ ref'd n.r.e.); *McKinney* v. *Tromly*, 386 S.W.2d 564 (Tex.Civ.App.—Tyler 1964, writ ref'd n.r.e.); *see also* Op.Tex.Atty.Gen. No. WW-1403 (1962). Subsequent to the district court's decision on remand, this principle was codified in Texas' new Medical Practice Act:

> a person licensed to practice medicine shall have the authority to delegate to any qualified and properly trained person or persons acting under the physician's supervision any medical act which a reasonable and prudent physician would find is within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician, the act can be properly and safely performed by the person to whom the medical act is delegated and the act is performed in its customary manner, not in violation of any other statute, and the person does not hold himself out to the public as being authorized to practice medicine. The delegating physician shall remain responsible for the medical acts of the person performing the delegated medical acts.

Tex.Rev.Civ.Stat.Ann. art. 4495b § 3.06(d)(1) (Vernon Supp.1982-1983). The Texas Nursing Practice Act defines administration of treatments prescribed by a licensed physician as a "professional nursing act" and hence not unlawful practice of medicine. *Id.*, art. 4518 § 5. However, consistent with the district court's finding, 516 F.Supp. at 976, the new Medical Practice Act also allows delegation to any qualified person, not

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[3] The joint brief of the Texas Medical Association and the Dallas County Medical Society as amicus curiae is reprinted as an appendix to the district court's opinion on remand. 516 F.Supp. at 987.

only to nurses. The Medical Practice Act goes on to clarify the legal status of a physician's delegatee:

> A person to whom a physician has delegated a medical act to perform is not guilty of practicing medicine without a license unless the person acts with knowledge that the delegation and action thereunder is a violation of this Act.

Tex.Rev.Civ.Stat.Ann. art. 4495b § 3.07(i) (Vernon Supp.1982-1983).

The Medical Practice Act's requirement that a physician supervise those to whom he delegates a medical act has appeared in a number of prior statutes, and has been construed by the Texas Attorney General "not [to] require the constant physical presence of a physician to authorize the performance of professional nursing acts by one not otherwise licensed to perform them, so long as the responsible physician personally assumes control and supervision of the employee or instructs him in what is to be done, and remains reasonably available to see that the nursing acts are properly performed." Op.Tex.Atty.Gen. No. H-395 (Sept. 9, 1974). *See also* Op.Tex.Atty. Gen. No. H-1295 (Dec. 19, 1978) (nurses may administer treatment without direct supervision by doctor); Op.Tex.Atty.Gen. No. H-368 (Aug. 12, 1974) (physical therapy may be administered pursuant to doctor's directions without any requirement of constant physical presence of doctor); Op.Tex.Atty.Gen. No. H-27 (Apr. 12, 1973) (ambulance attendants not in physical presence of doctor may provide emergency care if in telephone communication with him).[4]

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[4] These interpretations remain good law under the Medical Practice Act:

> No substantive changes in prior law or interpretation of prior law have been intended unless expresely done so in this Act. Consistent with this intention, unless expresely provided otherwise in this Act, any previous judicial opinion, attorney general's opinion, board practice, or interpretation is not to be considered modified or declared inapplicable.

Medical Practice Act of 1981, 67th Leg., 1st C.S., ch. 1, § 6(c).

We think the prescription and instructions for CIC that the district court required the Tatros to provide to the school district fulfill the requirements of Texas law and allow school district employees legally to administer CIC to Amber.[5] We have fully reproduced these documents in the margin to emphasize that a shcool district is entilted to require a detailed prescription and instructions tailored to the particular needs of each individual child for whom it is asked to provide health-related services under the EAHCA. It should not be required to exercise medical discretion. The prescription should make clear, as Amber's does, that the child is under the continuing care of the prescribing physician who will monitor the child's continuing need for the services and modify the prescription

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[5] The school district also was provided with the Tatros' written consent to its provision of CIC to Amber. Amber's doctor's prescription was in letter form as follows:

Mr. John Townley
Irving Independent School District
901 O'Connor Rd.
Irving, Texas

Re: C.I.C. instructions for
Amber Tatro—Prescription

Dear Sir:

Amber Tatro has been placed on a schedule of Clean Intermittent Catheterization every three to four hours during the waking day. Amber is to be catheterized at the times listed:

6:30 A.M.	3:30 P.M.
9:30 A.M.	6:30 P.M.
12:30 P.M.	9:30 P.M.

If Amber's diaper is wet at the time for the scheduled catheterization, this should be reported to me or Dr. George Hurt at the Spina Bifida Clinic at The Scottish Rite Hospital as the above schedule may need to be modified.

A qualified school nurse or other qualified person can perform C.I.C. and attached to these instructions are the Scottish Rite Hospi-

accordingly. Further, the prescription should identify the circumstances in which the school district personnel should seek further guidance from the physician. Since in this case the school district has been provided these assurances, we con-

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tal instructions for catheterization of a female which are to be followed.

A # 10 or # 12 catheter should be used to start out.

The above schedule for catheterization and size of catheter may be altered upon the direction of myself or Dr. Hurt from time to time according to Amber's needs.

If there are any questions, I or Dr. Hurt may be reached through the Spina Bifida Clinic at Scottish Rite Hospital.

[The doctor's signature, as experience has taught us to expect, was illegible. The record reveals that Dr. Goldstein signed.]

Name

3/17/81

Date

Attached to the prescription were detailed instructions for administration of CIC:

TEXAS SCOTTISH RITE HOSPITAL FOR CRIPPLED CHILDREN INSTRUCTIONS FOR PARENTS ON CATHETERIZATION OF FEMALE

Purpose:
To completely empty the bladder at scheduled intervals in order to decrease the incidence of urinary tract infection.
Urine that stays stagnant in the bladder is more likely to become infected. A bladder that stays full becomes enlarged and thickened. Scheduled emptying of the bladder allows the patient to become familiar with the difference in the sensation of a full bladder and an empty bladder.

Equipment Needed:
Clean catheter, metal or rubber. (Metal is best since it can be boiled repeatedly without deterioration.)
Soap and water.

cluded that the requirement of *Tatro I* that CIC be a service that a nurse or other qualified person can perform is satisified.

The school district's second argument is that CIC is not a related service in Amber's case because it is not "required to assist [her] to benefit from special education." 20 U.S.C. § 1401(17) (1976); *Tatro I*, 525 F.2d at 563. The school district does not contest the district court's finding, consistent with the facts assumed in *Tatro I*, that CIC is required for Amber to attend the school district's half-day ECD classes. 516 F.Supp. at 977. Rather, it contends for the first time in its reply brief in this appeal that the ECD classes themselves are not necessary for Amber to benefit from special education.

The EAHCA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet

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Dish to catch the urine, for example, a re-usable jar.
Large underpad, to prevent soaking bed linens.

General Instructions:

1. Wash hands with soap and water.
2. Get all of the equipment ready.
3. Get child ready. (If possible, put at table height since it is easier to do this procedure at this height.) Place child on her back.
4. Spread labia apart with one hand and wash genitalia with soap and water with the other hand, *always* moving in a downward direction. (*Never* wash in an upward direction since this will move germs from around the rectum up into the area of the bladder opening.)
5. Insert catheter in urethra and let *all* urine drain out of the bladder. This may take longer than you think, so do not remove catheter until the urine has stopped draining.
6. If you are unable to catheterize, contact your local Public Health Nurse or call Texas Scottish Rite Hospital.
7. Discard urine.
8. Clean catheter. Clean with soap and warm water after each use. Allow to dry and place in a clean, dry envelope.

At least once a day after the catheter has been washed with soap and water, place it in a pot of water and boil for 20 minutes. Allow the catheter to air dry and place it in a clean dry envelope.

the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. §1401(16) (1976). The school district contends that before Amber is entitled to CIC, she must allege and prove that she could not benefit from special education provided to her by the school district at home or in another institution where CIC is already being provided. If she could benefit from special education in these alternatives placements, the argument goes, provision of CIC by the school district would not be required to fulfill the requirements of the EAHCA. We cannot agree that the Tatros must make such a showing in this case.

In its first case considering the EAHCA, the Supreme Court recently held that the statute provides a "basic floor of opportunity" consisting of personalized instruction and related services designed to enable handicapped children to benefit from education. *Board of Education* v. *Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). Although the state is accorded wide discretion to choose educational means, *id.* 102 S.Ct. at 3051-52, and need not maximaze each child's potential, *id.* 102 S.Ct. at 3048, the required instruction and related services must meet certain standards. "Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and *must comport with the child's IEP*." *Id.* 102 S.Ct. at 3049 (emphasis added). Similarly, the regulations under the EAHCA require that each handicapped child's placement be based upon his or her IEP. 34 C.F.R. § 300.552(a)(2) & (b) (1982).

The EAHCA provides that each handicapped child's IEP will be jointly developed by the school officials, the child's teacher, his or her parents and, when appropriate, the child. 20 U.S.C. § 1401(19) (1976). The IEP is the educational blueprint that specifies how the child is to be taught, sets goals and determines how progress is to be measured. *Id.; see Helms* v. *McDaniel*, 657 F.2d 800, 802 (5th Cir.1981), *cert. denied* 455

U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). As such, the IEP is the primary vehicle for implementing the requirements of the EAHCA. In requiring that special education and related services be provided in conformity with a child's IEP, the Supreme Court recognized the central role played by the IEP in a statutory scheme like the EAHCA, which has placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents. *Rowley*, 102 S.Ct. at 1051-52; *McDaniel*, 657 F.2d at 802.

Amber's IEP explicitly calls for her placement in the school district's ECD classes. *See* Plaintiffs' Proprosed Stipulation of Facts, exhibit A. The IEP states that its justification for characterizing this setting as the most appropriate as well as the least restrictive is that "[t]esting indicates the need for [Early Childhood] placement," *Id.* Moreover, the "instructional/learning strategies" established by Amber's IEP include provision for a "structured atmosphere," immediate feedback and "small group instruction," *id.*, all of which are consistent with ECD placement.

We are convinced that the central role of the IEP in the educational scheme contemplated by the EAHCA and in the standard of review developed in *Rowley* gives rise to a presumption in favor of the educational placement estabished by Amber's IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected and we need not reach the thorny issue of what circumstances might call for judicial modification of an IEP. *See Rowley*, 102 S.Ct. at 3051 (setting out general standard of review).[6] In Amber's case, by

[6] We do not place an undue burden on the school district; the IEP is not etched in stone. The EAHCA and its attendant regulations provide for periodic review and modification of IEP's by school

virtue of the provisions of her IEP, the "special education" required by the EAHCA consists of her participation in the school district's ECD classes.[7] Since the district court found as a fact that provision of CIC during the school day is necessary for Amber to attend ECD classes, and since that finding has not been shown to be clearly erroneous, CIC is therefore "required to assist a handicapped child to benefit from special education" and is a "related service" under the EAHCA. 20 U.S.C. § 1401(17) (1976); *Tatro I*, 625 F.2d at 563. The school district must provide it to Amber Tatro.

II. THE SECTION 504 CLAIM AND ATTORNEYS' FEES

The EAHCA does not provide for attorneys' fees awards. The district court awarded attorneys' fees to the Tatros under section 505 of the Rehabilitation Act of 1972, *as amended*, 29 U.S.C. § 794a(b) (Supp. V 1981), which authorizes such awards to prevailing parties in actions to enforce provisions of the

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authorities and parents. 20 U.S.C. §§ 1412(4), 1414(a)(5) (1976); 34 C.F.R. § 300.343(d) (1982).

[7] The school district also asserted in its reply brief that ECD classes are for handicapped students only. The court in *Tatro I* apparently assumed that ECD classes also included nonhandicapped children because it rested its decision in part upon its conviction that Amber's exclusion from ECD classes would violate the "mainstreaming" mandate of the EAHCA. 625 F.2d at 563. The statute requires that "to the maximum extent appropriate," handicapped children will be educated with non-handicapped children, and that removal of handicapped children from regular classes will occur only when their handicaps cannot be accommodated by "supplementary aids and services." 20 U.S.C. § 1412(5) (1976); *Rowley*, 102 S.Ct. at 3049. The record does not clearly establish whether, in fact, the school district's ECD classes are for handicapped students only. However, even if the classes are only for the handicapped, so that the EAHCA's mainstreaming provisions do not require that Amber attend them, we have seen that her IEP does require ECD class attendance. Therefore, under the statute and *Rowley*, so does the EAHCA.

Rehabilitation Act. 29 U.S.C. § 701 *et seq.* (1976). *Tatro I* had held that section 504 of that Act imposed an obligation on the school district to provide CIC to Amber. 624 F.2d at 564-65. The school district now argues that the Supreme Court's subsequent decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 57 L.Ed.2d 594 (1981) precludes a finding that section 504 imposed such affirmative duties on state agenices, and that therefore, no Rehabilitation Act violation has been established to support an attorneys' fees award.[8]

In *Pennhurst*, the Supreme Court was asked to decide whether section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, conferred enforceable substantive rights on the beneficiaries of the Act. In deciding that it did not, the Court referred to *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), its only major case involving section 504, as illustrating the failure of the lower court.

> to recognize the well-settled distinction between Congressional "encouragement" of state programs and the imposition of binding obligations on the States. . . . Relying on that distinction, this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obli-

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[8] As the district court correctly observed, the question whether Section 504 imposes affirmative obligations on the states is logically antecedent to the question of whether such obligations are enforceable by an implied right of action. 516 F.Supp. at 984. If such obligations exist after *Pennhurst*, there is a private right of action to enforce them in this circuit. *Helms* v. *McDaniel*, 657 F.2d 800, 806 n. 10 (5th Cir. 1981) *cert. denied* 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982); *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980); *Tatro I*, *supra* (implicit); *see also Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

> gates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that "state agencies such as Southeastern are only 'encourage[d]' . . . to adopt and implement such policies and procedures," *Id.*, at 410, 60 L.Ed.2d 980, 99 S.Ct. 2361 [2369] (quoting the Act), we stressed [that] "Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411, 60 L.Ed.2d 980, 99 S.Ct. 2361 [2369].

451 U.S. at 27, 101 S.Ct. at 1544-45, 67 L.Ed.2d at 713 (citation omitted).

Although *Pennhurst* reinforced the district court's doubts that section 504 requires provision of CIC, the court concluded that the Supreme Court had not spoken with sufficient clarity to allow it to depart from prior decisions of this court squarely on point. 516 F.Supp. at 985. As a single panel of the court, we find ourselves similarly constrained. *Tatro I*, binding upon us to the extent that it is law of the case, clearly held that CIC is within section 504's nondiscrimination mandate. 625 F.2d at 564. Moreover, two other panels of our court have held that states must take some affirmative action to provide "services and accomodations" under section 504, notwithstanding the *Davis* decision. *Majors* v. *Housing Authority*, 652 F.2d 454, 457 (5th Cir.1981); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir.1980). Although *Camenisch*, relied upon in *Tatro I*, was vacated as moot without reaching the merits of the section 504 issue, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), *Majors* remains good law in our circuit. A recent decision of a sister circuit has reached the same result. *New Mexico Ass'n for Retarded Citizens* v. *New Mexico*, 678 F.2d 847 (10th Cir.1982).

As we have seen, a prior decision does not bind us as law of the case if it is supervened by controlling authority. *White* v. *Murtha*, *supra*. Similarly, the general rule that one panel of our court does not overrule another panel does not prevent us from overriding a prior decision "based entirely on [a] theory"

subsequently rejected by the Supreme Court. *Hanson* v. *Town of Flower Mound*, 679 F.2d 497, 501 (5th Cir.1982). We do not think *Pennhurst* goes so far. In *Majors*, this court recognized that *Davis* generally disapproved of affirmative action requirements under section 504. 652 F.2d at 456. However, the court went on to emphasize the following *caveat* from *Davis:*

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial an administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

Davis, 442 U.S. at 412-13, 99 S.Ct. at 2370; *Majors*, 652 F.2d at 456. This court concluded, as had the panels in *Camenisch* and *Tatro I*, that where a plaintiff, unlike the plaintiff in *Davis*, could receive the full benefits of a state program if reasonable accomodations were provided, refusal to provide them would constitute discrimination and would not fall within the *Davis* affirmative action exception. *Majors*, 652 F.2d at 457-58; *Tatro I*, 625 F.2d at 564; *Camenisch*, 616 F.2d at 132-33; *accord, New Mexico Ass'n for Retarded Citizens, supra.*

Although *Pennhurst* undoubtedly emphasized the component of the *Davis* decision that disapproved judicial recognition of affirmative obligations under section 504, it did not overrule the portion of *Davis* relied upon in our earlier decisions. *Pennhurst* therefore forms an insufficient basis upon which to justify a departure from prior law by this panel.

The school board's additional objections to its liability under section 504 are groundless and merit little discussion. The district court found that given our prior decision that refusal to provide CIC is discriminatory under section 504, Amber had been thereby excluded from a "program of activity receiving federal financial assistance." 29 U.S.C. § 794 (Supp.V 1981); 516 F.Supp. at 977 n. 17. That finding, necessary to establish a cause of action under section 504, is amply supported by the record.[9] The school board's other suggested errors are likewise refuted by the record.

III. THE STATE BOARD

The district court enjoined the school board and State Board to "modify the Individual Education Program of Amber Tatro to include the provision" of CIC. Upon the motion of the school district, the court's original judgment was amended to hold the State Board jointly and severally liable with the school board for attorneys' fees. The State Board argues that it should not have been included in the injunction and that it is not liable for attorney's fees.

The EAHCA places primary responsibility for development and revision of IEP's upon local school boards. 20 U.S.C. § 1414(a)(5) (1976). The state educational agency, here the State Board, is given supervisory responsibility to assure that local agencies carry out their responsibilities. 20 U.S.C. § 1412(6) (1976). The State Board argues that the district court erred in ordering it to modify Amber's IEP because the EAHCA places that duty on the local school board. The State

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[9] *See Tatro* v. *Texas*, No. CA-3-79-1281-G (N.D. Tex. Sept. 8, 1981) (unpublished memorandum opinion) in which after entry of the judgment below, the district court afforded the school board an opportunity to reopen the record to rebut the school superintendent's concession that the school district received federal assistance for programs from which Amber had been excluded. The record reveals no attempt by the school district to do so.

Board's argument is based on an unduly scholastic reading of the district court's judgment. Although the words of the judgment standing alone perhaps suggest that the State Board should itself engage in the revision of Amber's IEP, the district court's opinion makes clear that the State Board has only been enjoined to act in the supervisory capacity required of it by the EAHCA. 516 F.Supp. at 972 ("Because the State Board of Education has supervisory responsibilities for assuring that Amber is educated in accordance with the EAHCA . . . the members . . . will be retained in their official capacities for the purpose of injunctive relief."). *See Kruelle* v. *New Castle County School District*, 642 F.2d 687, 697 (3d Cir. 1981) (interpreting district court's order to state agency to require only the supervisory action contemplated by the EAHCA); *see also S-1* v. *Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied* 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981). The State Board need only "assure" that Amber's IEP conforms to the EAHCA as interpreted by this court. 20 U.S.C. § 1412(6) (1976). Given the State Board's prior action preventing administration of CIC in Amber's case, it was within the district court's discretion to enjoin the State Board to fulfill its statutory duty in order to insure complete prospective relief to the plaintiffs.

The State Board's second argument is that even if it was properly enjoined under the EAHCA, the district court did not make a specific finding that it had violated section 504 and that it was therfore improper for the district court to hold it liable for attorneys' fees under the Rehabilitation Act. We have held already that under *Tatro I* the district court properly held that by refusing to provide CIC, the school board denied Amber the benefits of a federally assisted program or activity in violation of section 504. The record established that after the school board's decision not to provide CIC was reversed by an independent hearing officer and the state Commissioner of Education, the State Board acted to reinstate the school board's original decision. *See* Plaintiffs' Exhibit 5a and attachments (Order of the State Board of Education, Sept. 8, 1979). That action, which the State Board does not deny that it took, had

the effect of denying the benefits of a federally funded program to Amber Tatro just as the school board's action had. For the same reasons, the State Board's action violated section 504 and supported an award of attorneys' fees under section 505.[10]

For the reasons we have stated, the judgment of the district court is in all respects AFFIRMED.

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[10] The district court found that an attorneys' fees award against the State Board was not barred by the Eleventh Amendment. *Tatro* v. *Texas*, No. CA-3-79-1281-G (N.D.Tex. Sept. 8, 1981) (unpublished memorandum opinion). The State Board has not appealed that decision; however it has suggested that its action reversing the decisions of the hearing officer and Commissioner of Education was taken in its judicial capacity and is entitled to immunity on that basis. We need not decide whether judicial immunity might bar attorneys' fees awards under § 505, *see Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), because this court has held that the EAHCA denies to state educational agencies the judicial power to review the decisions of an independent hearing officer. *Helms* v. *McDaniel*, 657 F.2d 800, 805-06 & n. 9 (5th Cir. 1981), *cert. denied* 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). Lacking judicial capacity, the State Board had no judicial immunity.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

NO. 81-1454.

Henri and Mary TATRO, Individually,
and as Next Friend of Amber Tatro, A Minor,
Plaintiffs-Appellees, Cross-Appellants,
v.
The STATE OF TEXAS, *et al.*,
Defendants,

State Board of Education,
Defendant-Appellant,

The Irving Independent School District,
Defendant-Appellant, Cross-Appellee.

Appeal From The United States District Court For The Northern District Of Texas

U.S. COURT OF APPEALS
FILED
JUL 5 1983
GILBERT F. GANUCHEAU
CLERK

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/25/83, 5 Cir., 198__, ____ F.2d ____).

(JULY 5, 1983)

Before BROWN, GEE and JOLLY, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ?????
United State Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, *et al.*,

Plaintiffs,

v.

STATE OF TEXAS, *et al.*,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH McELROY, JR. CLERK
By JOSEPH MEELROY, JR.
Deputy

MEMORANDUM OPINION

Amber Tatro is a 3½ year old female suffering from myelomenengocele, commonly referred to as spina bifida. As a result of this handicap, Amber not only suffers from orthopedic and speech impediments, but also from what is called a neurogenic bladder. Because of the neurogenic bladder condition, she must be "catheterized" approximately every three of four hours each day, the method of choice being Clean Intermittent Catherization ("CIC"). This procedure involes washing a little metal tube, the catheter, inserting the catheter in the bladder to allow the urine to drain out, pulling the catheter out, and then wiping the bladder region. This procedure can be performed by laymen after proper training, but because of the child's age, she is unable to perform CIC upon herself. This suit is rooted in the decision of the Irving Inde-

pendent School District that were Amber to attend its early childhood development program, the school would not provide CIC to Amber during her school day.

Henri and Mary Tatro, individually and as next friend of Amber Tatro, brought this action for injunctive relief and money damages against the State of Texas, the State Board of Education, the Texas Education, the Texas Education Agency, the Board of Trustees for the Irving Independent School District, and J. F. Townley, individually, as Superintendent of the Irving Independent School District. Plaintiffs allege that provision of CIC to Amber is required by the Education of All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the stated policy of the Irving Independent School District, *Treatment of Students by School Personnel*, Policy No. 5157. Plaintiffs have applied for a preliminary injunction ordering defendants to provide catheterization for Amber during the pendency of this suit. Defendant Townley filed a motion to dismiss the complaint as against him.

A parent is indeed a "hostage to fate." Caring for a child under the best of circumstances taxes financial and emotional reserves—here, most heavily. Amber's plight tugs at the heartstrings, and given the relative rarity of spina bifida, there is a temptation to here achieve a "humane" result. Despite the limited number of times school boards may be faced with a child requiring CIC, the interpretation of these federal statutes has wide consequences because it involves definitions of the duty of hundreds of school districts to be discharged in myriad factual patterns. The limits on this court's institutional role here gives little play for this court's humanitarian concern for Amber and her parents. This court instead is called on to engage in the relatively emotionally barren task of providing the interstitial stuffing to acts of Congress against a background of its intent and purpose in enactment. Doing so, the court concludes that the application for preliminary injunction must be denied and

the motion to dismiss the complaint as against Townley must be granted.[1]

To assist the states in educating the handicapped, federal grants are made available to them under the Education for All Handicapped Children Act. Grants are conditional on the states establishing "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). *See also, Lora* v. *Board of Education of City of New York*, 456 F.Supp. 1211, 1226 (E.D. N.Y. 1978); 20 U.S.C. §§ 1414(a)(6)-(7). Plaintiffs assert that the Act is to be interpreted in this case as requiring provision of CIC to Andrea. This court disagrees.

Free appropriate public education is statutorily defined as "special education" and "related services" which meet certain requirements. 20 U.S.C. § 1401(18). Plaintiffs assert that the provision of CIC to Amber is a related service. The term "related service" is defined as:

> . . . transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17).

Free appropriate public education refers to special education *and related* services which meet various conditions. The services required to be provided must be "related" to the special education. Amber suffers from a physical condition which unfortunately necessitates that she receive CIC every

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[1] While no legal duty is owed by the District and the other defendants, one hopes that they will, out of compassion within the limits of their institutions, attempt to ease the burdens on Amber's parents.

three or four hours. CIC is required whether or not she is attending school. CIC is not any more related to "special education" than other requisite to her existence, such as food or water. Provision of CIC, unlike such listed "relates services" as "special pathology and audiology, psychological services, physical and occupational therapy, [and] recreation," is not directly related to the provision of "special education."

The definition of "related services" has only two categories: (1) transportation as may be required top assist a handicapped child to benefit from special education, and (2) supportive services as may be required to assist a handicapped child to benefit from special education. The transportation provision is not applicable and while it makes possible the continued health of Amber, CIC does not enhance the benefits of a particular form of special education. If CIC be deemed a medical service, it would stillnot be a medical service for "diagnostic and evaluation purposes." CIC is not developmental or corrective.

CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace. One can argue that read literally, every necessary life support system must be furnished. But the court has found no congressional intent to sweep broadly in its usage of the word "related." Instead the court finds that to be related in the statutory sense the service requirement must arise from the effort to educate. There is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life but once that life maintenance service is provided, it is unrelated to her learning skills.

This court has not been presented with any evidence in the legislative hisotry which would indicate that the term "related services" can be construed as broadly as plaintiffs urge. To the contrary, the languge used while evincing a broad purpose carefully limits the means of achieving the. For example, medical services while illustrated by a listing of a variety of services is carefully limited to diagnostic and evaluation purposes. That

qualification is inconsistent with finding a congressional intent to furnish all support services needed by persons during school not because of the schooling but because that care is always required. The notion of related services as being those services that make more beneficial the special education being provided was contained even in the original Senate Bill; the term "related services" was originally defined as:

> . . . transportation, developmental, corrective, and supportive services (specifically including at least speech pathology an audiology, psychological services, counseling services, physical and occupational therapy, and recreation) *necessary* for a handicapped child to *fully benefit from special education*, and including early identification and assessment of handicapping conditions in children and provision of such services to such children.
> . . .

(Emphasis added). S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Adm. News 1424, 1466.

Plaintiffs point to regulations implementing 20 U.S.C. § 1401(17) which include among "related services," "school health services." The regulation in turn define the latter as "services provided by a qualified school nurse or other qualified person . . .," 45 C.F.R. § 121a.13(b)(10) (1978). Because CIC's can be performed by nurses, plaintiffs argue it is a permissible "school health service."

But the statute does not require provision of CIC, and the implementing regulation obviously can only implement duty; it cannot create duty. Nevertheless, we examine this argument to correct a possible misinterpretation of these delphic regulations. Though § 121a.13(10) on its face purports to define "school health services," looking at it closely should make it clear that it is not a complete definition. After all, "services provided by a qualified school nurse or other qualified person" covers an enormous array of services having nothing to do with the education of handicapped children. Section 121a.13(a) of the regulations defines "related services" as:

> . . . transportation and such developmental, corrective, and other supportive services as are required to assist a

> handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

The most logical interpretation of the regulations is that "school health services" mean those services which not only meet the requirements of § 121a.13(b)(10) but also are "related services" as defined in the first sentence of § 121a.13(a). The definition in the statute. It follows that provision of CIC cannot be a "related service" by the terms of the regulations. And thus provision of CIC here is not a "school health service."

Plaintiffs also allege violation of the Rehabilitation Act of 1973, specifically, 29 U.S.C. § 794. Section 794 provides in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 707(7) of the title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Plaintiffs allege that defendants, in refusing to provide CIC to Amber, are effectively denying Amber the benefits of, and effectively excluding Amber from a federally-funded program and so are violating § 794.

The court finds otherwise even assuming that plaintiffs have a right of action under this Act. Here the defendants are merely refusing to affirmatively provide catheterization. The Rehabilitation Act cannot be interpreted as requiring a school to furnish catheterization that Amber would need regardless whether she is taking advantage of any educational programs or not. Plaintiffs assert that local defendants with the agreement of state defendants "have refused to provide

[catheterization]. No alternative was given to Amber's parents other than for one of them to attend to Amber's needs during the school day." Brief for Plaintiffs at 10. The latter half of this assertion is ambiguous. In light of the complaint, the plaintiffs' brief taken as a whole, plaintiffs' proposed stipulation of facts, and a conference held in chambers, the most reasonable interpretation of that assertion is that Amber's participation in the program is conditioned on either her parents or her parents' agents providing catheterization. This is simply the corollary to the decision to not provide CIC to Amber, and is permissible under the Rehabilitation Act. Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up governmental health care for people seeking to participate in such programs.

Analysis of the regulations which implement both the Rehabilitation Act and the Education Act leads to the same conclusion. Section 84.33 of Title 45 of the Code of Federal Regulations requires certain provision of free appropriate public education. The definition of appropriate public education is analogous to that definition in the Education Act, appropriate education here being composed of "regular or special education" and *related* "aids and services." 45 C.F.R. § 84.33(b) (1978). The relatedness requirement would prevent provision of CIC here as well. In addition, plaintiffs cannot rely on a requirement that defendants provide "nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 45 C.F.R. § 84.37(a)(1) (1978). Though nonacademic and extracurricular services and activities may include health services, the connection between provision of CIC and an equal opportunity to participate in nonacademic and extracurricular services is far from clear to this court.

Plaintiffs also argue that provision of CIC by the Irving Independent School District would be the provision of a life-saving service, already authorized by its policy number 5157,

Treatment of Students By School Personnel. Section B of the policy states:

> B. Hypodermic injections may be given at school, but *only* on an emergency (life saving) basis. For example: for individuals who are highly allergic to insect bites, diabetes or other conditions this shall be done under the following conditions: . . . .

The use of the word "emergency" would preclude regular CIC "injections." Moreover, catheterizations are not "injections."

Defendant Townley's motion to dismiss as to him is granted and plaintiffs' motion for a preliminary injunction is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.
Sept. 2, 1980.

No. 81-1069.

Henri and Mary TATRO, *et al.*,
Plaintiffs-Appellants,

v.

The STATE OF TEXAS, *et al.*,
Defendants-Appellees.

Parents of child with neurogenic bladder condition caused by myelomeningocele brought action against school district for alleged violation of Education for All Handicapped Children Act of 1975 and Rehabilitation Act of 1973 arising from failure to include scheduling of clean instrument catheterization in the child's individual education plan. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 481 F.Supp. 1224, entered judgment denying parents' motion or preliminary injunction, and appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) clean instrument catheterization necessary for the child to be able to be present in classroom at all was "supportive service" required to assist handicapped child to benefits from special education for purposes of Education for All Handicapped Children Act of 1975, and thus clean instrument catheterization was "related service" for purposes of provision of the Act mandating that recipients of federal funds must assure all handicapped children right to special education and related services, and (2) failure to include in individualized education plan devised for the child schedule of clean instrument catheterization violated provision of Rehabilitation Act of 1973 mandating that no otherwise qualified handicapped individual shall be excluded from participation in or be subjected to

discrimination under any program or activity receiving federal financial assistance by reason of his handicap.

Vacated and remanded.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, TATE, and SAM D. JOHNSON, Circuit Judges.

GOLDBERG, Circuit Judge:

Amber Tatro is a four-year-old child who suffers from myelomeningocele, a birth defect commonly known as spina bifida.[1]

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[1] We caution that we recite the "facts" here only to place the case in context and that we really have no facts to speak of. Following a conference between the parties and the district court, the court invited stipulated facts. Plaintiffs submitted their proposed stipulation; defendants failed to respond. Instead of compelling such a response or making its own findings, the district court issued a memorandum opinion denying plaintiffs' motion for a preliminary injunction. Thus, we have no findings upon which to rely for our review.

Obviously, the preferable course would have been for the district court to find facts so that its disposition of plaintiffs' motion would be more fully amenable to appellate review. Nevertheless, we are not powerless on this appeal. Since the district court's denial of plaintiffs' motion for a preliminary injunction rested on its legal interpretation of the Acts under consideration, we can review the district court's legal conclusion. Furthermore, in order to provide meaningful guidance to the district court for its consideration of plaintiffs' motion on remand, we shall assume that the facts, which we detail in this opinion and base on plaintiffs' proposal, are true. On remand, of course, the district court should make the appropriate findings. If the district court finds the facts to be different from those we state, it must then determine whether these factual deviations are material so as to alter the conclusion we reach.

Additionally, since the district court denied plaintiffs' motion on the ground that there was no likelihood of success on the merits, we shall discuss only that factor for a preliminary injunction. On remand,

As a result of this congenital defect, Amber suffers from orthopedic and speech handicaps and from a neurogenic bladder. This latter condition prevents Amber from being able to empty her bladder voluntarily. As a result, Amber must be catheterized every three to four hours in order to function normally without the danger of developing chronic kidney infection.

In 1979, Amber became eligible for participation in the early childhood development program provided by defendant Irving Independent School District ("the school district"). After a series of meetings with Amber's mother, the school district's Admission, Review and Dismissal Committee developed an Individualized Education Plan ("IEP") for Amber as required by the Education for All Handicapped Children Act of 1975 ("the EAHCA"), 20 U.S.C. § 1414(a)(5).[2] The IEP stipulates

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the district court should consider the other relevant criteria, to-wit, the irreparable harm to plaintiffs from failure to issue the injunction, the harm to the defendant from issuance of the injunction, and the public interest. *See Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974). For its consideration of these factors, we direct the district court's particular attention to our recent decision in *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980).

[2] 20 U.S.C.A. § 1414(a)(5) (West 1978), provides the following:

> (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—
>
> (5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually.

An individualized education program is defined as

> a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to

that physical and speech therapy is to be provided to Amber. However, the IEP fails to specify the provicion of any services to Amber that may be necessary due to her neurogenic bladder. More particularly, the IEP fails to specify that Clean Intermittent Chatheterization (CIC) will be administered to Amber during the school day.[3]

Following the fruitless pursuit of the state remedies required by the EAHCA,[4] Amber's parents, plaintiffs, sued in

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meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id. § 1401(19).

[3] CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clear.; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the catheter is withdrawn; and the amount of urine collected is measured and noted. The procedure can be taught to anyone after a training session of approximately thirty minutes, and it need not be performed by a doctor or nurse. Currently, Amber is catheterized at home by her parents, teenage sibling, and babysitter. However, when Amber is eight or nine years-old, she will be able to perform CIC upon herself.

[4] These procedures are detailed in 20 U.S.C.A. § 1415(a)(c) (West 1978):

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with

respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian.

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to

district court in accordance with 20 U.S.C. § 1415(c)(2).[5] They contend that because the IEP contains no provision for CIC, the school district has violated the EAHCA, 20 U.S.C. § 1412(1), by failing to provide a free appropriate public education to Amber.[6] They also contend that the school district has

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the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

[5] 20 U.S.C.A. § 1415(e)(2)(West 1978) provides the following:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

[6] 20 U.S.C.A. § 1412(1) (West 1978) provides that "[i]n order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

Free appropriate public education is defined as

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. § 1401(18).

Free appropriate public education thus includes special education and related services. The Act defines special education as "specially designed instruction, at no cost to parents or guar-

violated section 504 of the Rehabilitation Act of 1973, ("section 504"), *as amended*, 29 U.S.C. § 794.[7] The case reaches us from the district court's denial of plaintiffs' motion for a preliminary injunction to require the school district to provide CIC.[8] For the reasons detailed below, we vacate and remand.

I. The EAHCA

The Education for All Handicapped Children Act of 1975, 89 Stat. 773 (1975), was sparked by an "[i]ncreased awareness of the educational needs of handicapped children and landmark

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dians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* § 1401(16). Related services are defined as follows:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id. § 1401(17).

[7] Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C.A. § 794 (West Supp. 1980), in pertinent part, provides the following:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[8] In its opinion denying plaintiffs' motion for a preliminary injunction, the district court also granted the motion to dismiss for lack of personal jurisdiction of defendant Townley, Superintendent of the Irving Independent School District. This ruling is not before us on this appeal.

> In addition, defendants raise multifarious arguments attacking the sufficiency of plaintiffs' complaint. These issues are not before us and should be handled on remand.

court decisions establishing the right to education for handicapped children . . .." S.Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* [1975] U.S.Code Cong. & Admin. News, pp. 1425, 1429. The Congress found that handicapped children were receiving inadequate services, were not being properly identified and evaluated, and were being subjected to unnecessary exclusion from the regular educational environment.[9] To reme-

[9] The congressional findings are contained in section 3(a) of the EAHCA:

> The Congress finds that—
>
> (1) there are more than eight million handicapped children in the United States today;
>
> (2) the special educational needs of such children are not being fully met;
>
> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
>
> (4) one million of handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
>
> (5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
>
> (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;
>
> (7) developments in the training of teachers in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;
>
> (8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and
>
> (9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C.A. § 1401 (West 1978) (historical note).

dy this situation, Congress increased educational grants to participating states to enable them to meet the unique needs of handicapped children, *see id.* at 7-9, [1975] U.S.Code Cong. & Admin. News at 1431-33, strengthened procedures to enable parents of handicapped children to advocate more forcefully the rights of their handicapped children, *see id.* at 9, [1975] U.S.Code Cong. & Admin. News at 1433, adopted judicially imposed due process requirements that ensure the proper identification and evaluation of handicapped children, *see id.* at 26-30, [1975] U.S.Code Cong. & Admin. News at 1450-52, and stipulated that handicapped children were to be integrated into the regular classrooms to the maximun extent appropriate. *See id.* at 33-34, [1975] U.S.Code Cong. & Admin. News at 1457-58; S.Conf.Rep. No. 455, 94th cong., 1st Sess. 30, *reprinted in* [1975] U.S.Code Cong. & Admin. News, pp. 1480, 1483. In reference to the last objective, the Report stated:

> The Conferees point out that while instruction may take place in such locations as classrooms, the child's home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classed, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regualr classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.

Id.

To ensure the provision of proper services, Congress mandated that recipients of federal funds must assure "all handicapped children the right to a free appropriate public education," 20 U.S.C.A. § 1412(1)(West 1978), which consists of special education and related services. *See id.* § 1401(18).[10] The

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[10] The definitions of the terms "free appropriate public education," "special education," and "related services," are reprinted at note 6 *supra*.

battle lines in this case havve been drawn on the issue whether the provision of CIC to Amber, a handicapped child within the meaning of the EAHCA, *see id.* § 1401(1),[11] is a related service.

The district court held that CIC is not. It observied that there are only two categories of related services: (1) transportation required to assist a handicapped child to benefit from special education, and (2) developmental, corrective, and supportive services necessary to assist a handicapped to benefit from special education. It properly concluded that CIC is not transportation and that CIC is neither developmental nor corrective. The district court noted that "CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace," and that "[o]ne can argue that read literally, every necessary life support system must be furnished." Nevertheless, the district court concluded that there was "no congressional intent to sweep broadly in its usage of the word 'related.' " The court thus held that "to be related in the statutory sense the service requirement must arise from the effort to educate. There is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life but once that life maintenance service is provided, it is unrelated to her learning skills."

The district court further observed that the regulations implementing the EAHCA[12] construe related services to in-

---

[11] 20 U.S.C.A., § 1401(1) (West 1978) provides the following:

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

[12] These regulations are contained at 45 C.F.R. part 121a (1979). They were drafted by the Office of Education of the former Department of Health, Education and Welfare whose functions have since been transferred to the newly-created Department of Education. *See* Pub.L.No. 96-88 § 601, 93 Stat. 696 (October 17, 1979).

clude "school health services,"[13] which are defined as "services provided by a qualified school nurse or other qualified person." 45 C.F.R. § 121a.13(b)(10)(1979). Despite the fact that CIC comports with this defintion of school health services, to be a class of related services, must, like all categories of related services, arise from the effort to educate in order to fit within the statutory definition. Hence, CIC did not fit the bill. We find that the district court erred.

As the district court correctly observed, CIC falls within a literal interpretation of the statutory definition of the related services. Quite simply put, without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all. Thus, CIC is a supportive service required to assist Amber to benefit from her special education.

Nevertheless, the district court felt compelled to limit the literal words of 20 U.S.C. § 1401(17) because it perceived a need to circumscribe the scope of related services lest "every necessary life support system . . . be furnished." This perception, however, ignored the fact that the EAHCA contains its own limitations on the type of life support services that must be provided as related services. First, in order to be entitled to any related services at all, a child must be handicapped so as to require special education. 45 C.F.R. § 121a.14(1979)(comment one); *see* 20 U.S.C.A. § 1401(1) (reprinted at note *supra*).

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[13] 45 C.F.R. § 121a.13(a) (1979) provides the following:

> As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

Second, the life support service must be necessary to aid a handicapped child to benefit from the special education to be provided. *see id.* § 1401(17). Thus, a life support service would not be a related service if it did not have to be provided during shcool hours, but instead could be performed at some other time.[14] Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 45 C.F.R. § 121a.13(b)(10) (1979). Excluded from the term "related services" are those health-related activities which must be performed by a licensed physician that are not provided "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* § 121a.13(4).[15] Thus, even under a literal interpretation of the statutory definition, the types of life support services needed by a child which can be related services are limited.

Moreover, the district court's deviation from the literal words of the statute ignored a mandate contained in the EAHCA which is additional to the congressional requirement that states furnish each handicapped child a free appropriate public education consisting of special education and related

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[14] For example, suppose that a child required an insulin injection once a day to maintain his life. Since the injection could be administered at night after school, it would not be a supportive service required to assist the child to benefit from special education. Thus, it would not be a related service.

[15] The exclusion of medical services not performed for diagnostic and evaluation purposes derives from the definition of related services. *See* 20 U.S.C.A. § 1401(17) (West 1978). Given this exclusion, HEW quite properly eliminated such health-related services from the definition of related services contained in the regulations. Concomitantly, since there is no blanket exclusion from supportive services for all health-related services, the inclusion of health-related services that are not performed by a physician and are "required to assist a handicapped child to benefit from special education," *id.*, is quite proper.

services. The language of 20 U.S.C.A. § 1412(5) (West 1978) is quite unequivocal:[16]

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (5) The State has established . . . Procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regualr classes with the use of supplementary aids and services cannot be achieved satisfactorily . . ..

Construing the term "related services" to exclude services like CIC, necessary to keep a handicapped child in the classroom, would completely eviscerate this mandate. This we cannot do. In light of this categorical congressional judgment that handicapped children should be educated in the regular classrooms to the maximum extent appropriate, and given the existence of limitations in the statute which circumscribe the types of life support systems which must be provided as related services,

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[16] Equally categorical is 20 U.S.C.A. § 1414(a)(1)(C)(iv) (West 1978):

> A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—
>
> (1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—
>
> (C) establish a goal of providing full educational opportunities to all handicapped children, including—
>
> (iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs . . . .

we hold that the words "supportive services . . . as may be required to assist a handicapped child to benefit from special education" must be read literally to include the provision of CIC to Amber Tatro.[17]

II. SECTION 504

The district court gave plaintiff's claim under section 504 of the Rehabilitation Act of 1973[18] rather short shrift. the gravamen of its holding is that section 504 does not require the school district to provide CIC to Amber because "[p]laintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs." This conclusion is incorrect.

In *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980), plaintiff, a deaf graduate student at the University of Texas, brought suit against the University because of its refusal to provide him wih sign language interpreter services, an aid which he claimed was necessary for his participation in the University's programs. We affirmed the district court's grant of a preliminary injunction requiring the University to provide interpreter services. We held that the failure to provide interpreter services amounted to the exclusion of plaintiff from

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[17] Our holding that these words should be read literally, subject only to the limitations, contained in the statute, which we have discussed, is supported by the statute's enumeration of physical and occupational therapy, and recreation as examples of related services. *See* 20 U.S.C.A. § 1401(17) (West 1978). We fail to see how these services "arise from the effort to educate" any more than CIC.

In view of our holding that CIC is a related service, we need not address the issue whether 20 U.S.C.A. § 1414(a)(1)(C)(iv) (West 1978), by its use of the term "supplementary aids and services," contemplates the provision of services additional to "related services."

[18] Section 504 is reproduced at note 7 *supra*.

the University's programs and hence violated section 504. *See id.* at 133.

Analogously, Amber has been excluded from the school district's programs by the district's programs by the district's refusal to provide CIC to Amber, she will be unable to participate in the preschool programs of the school district. Such exclusion is expressly condemned by section 504.

Defendants contend that *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), dictates the contrary result. This assertion is incorrect. As we observed in *Camenisch, supra*, "the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training." *Id.* at 133. Thus, like *Camenisch*, this case is distinguishable from *Southeastern Community College* because, with the provision of CIC, Amber will be able to perform well in school and thus realize the principal benefits of the school district's program.[19] The school district's failure to provide CIC threfore violates section 504.

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[19] We by no means intend to intimate that every type of service, necessary to prevent the exclusion of an otherwise qualified handicapped person from a program, must be provided. First, section 504 does not require "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals . . . ." *Southeastern Community College, supra*, 99 S.Ct. at 2369. Thus, the College was not required to eliminate certain required courses or to provide individual supervision by faculty members whenever respondent, a deaf nursing student, would attend patients directly. *See id.*, 99 S.Ct. at 2368. This result obtained because "[w]hatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.*, 99 S.Ct. at 2369. In contrast, like the plaintiff in *Camenisch, supra*, who will receive the principal benefits of the University's program once a

VACATED and REMANDED for proceedings not inconsistent with this opinion.

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deaf interpreter is provided, Amber will realize the principal benefits of the school district's program once CIC is provided.

Second, *Southeastern Community College* possibly indicates that section 504 does not require the provision of services that would impose "undue financial and administrative burdens" upon the recipient. *See Southeastern Community College, supra*, 99 S.Ct. at 2370. Thus, for example, section 504 may not require the school district to provide a very expensive procedure like kidney dialysis to a child who needs such a service during the school day. However, CIC does not appear to approach an undue financial and administrative burden. It can be performed in five minutes by anyone who has received thirty minutes of training. This burden appears to be a far cry from being "undue." Of course, since we have no findings upon which to rely, *see* note 1 *supra*, we leave this determination to the district court.

STATUTES

20 U.S.C. § 1401 - EDUCATION - CH.33

§ 1401. Definitions

As used in this chapter—

* * *

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

* * *

§ 1415. Procedural Safeguards

* * *

Civil Action; Jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent

jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title BI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.

* * *

29 U.S.C. § 701 Et Seq.

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submite to such committees.

(As amended Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982.)

* * *

Article 4495b, Tex.Rev.Civ.Stat.Ann (Vernon Supp. 1982-83)

Medical Practice Act

* * *

§ 3.06. Construction

* * *

(d) This Act shall be so construed that:

(1) a person licensed to practice medicine shall have the authority to delegate to any qualified and properrly trained person or persons acting under the physician's supervision any medical act which a reasonable and prudent physician would find is within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician, the act can be properly and safely performed by the person to whom the medical act is delegated and the act is performed in its customary manner, not in violation of any other statute, and the person does not hold himself out to the public as being authorized to practice medicine. The delegating physician shall remain responsible for the medical acts of the person performing the delegated medical acts. The board may determine whether or not an act constitutes the practice of medicine, not inconsistent with this Act, and may determine whether any medical act may or may not be properly or safely delegated by physicians; . . . .

* * *

Office - Supreme Court, U.S.
FILED
JAN 18 1984
ALEXANDER L. STEVAS.

No. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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JOINT APPENDIX

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RELEVANT DOCKET ENTRIES
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10/12/79	Complaint and Application for Preliminary Injunction.
11/2/79	Original *Answer* of Irving ISD and the Board of Trustees for the Irving ISD.
11/6/79	Plaintiff's Motion for Leave to File Amended Complaint to Add Defendants.
11/8/79	Amended Complaint and Application for Preliminary Injunction.
11/28/79	Defendants State of Texas and Texas Education Agency's et al., Answer to Plaintiffs' Amended Complaint.
12/7/79	Defendants Roger Hill, Dr. Robert Pierce, Mrs. Anne Pfaff, Barbara Cardwell, Troy Kelley, Mrs. Pat Norman, and John Stipes' Original Answer.
12/21/79	Memorandum Opinion. . . Defendant Townley's motion to dismiss as to him is granted and Plaintiffs' motion for a preliminary injunction is DENIED.
1/11/80	Notice of Appeal by Plaintiffs.
10/28/80	Certified copy of order from the Fifth Circuit, issued as and for the mandate vacating judgment of the District Court and same is hereby vacated; and this cause is hereby remanded to said District Court in accordance with its opinion.
10/29/80	Opinion of the Fifth Circuit.
12/16/80	Defendant Townley's Original *Answer*.
12/17/80	Amended Answer of Irving ISD, the Board of Trustees for the Irving ISD, Roger Hill, Dr. Robert Pierce, Mrs. Anne Pfaff, Barbara Cardwell, Troy Kelley, Mrs. Pat Norman, and John Stipes.

12/19/80	State Defendant's First Amended Answer.
12/31/80	Memorandum Opinion. . . the State defendants' motion to dismiss as to them is granted insofar as it pertains to retrospective relief; defendants' motions to dismiss for lack of subject matter jurisdiction, for failure to properly plead federal financial assistance, for failure to state any cause of action. . . and for failure to join indispensable parties are denied; disposition of state defendants' motion to dismiss entirely as to them, and the disposition of defendants' motions to dismiss for failure to state a cause of action for damages. . . are deferred.
1/5/81	Pre-Trial Order.
1/5/81	Order Consolidating Preliminary Injunction Hearing with Trial on the Merits.
1/16/81	Interim Order. . . Irving ISD will promptly provide Amber Tatro an individual education program that includes any Clean Intermittent Catheterization necessary to its achievement.
2/6/81	Order. . . the Court invites the Texas Medical Association, or through its component association, the Dallas County Medical Society, to submit within 30 days an amicus curiae brief. . . Copies of this order with the copies of the pre-trial order and previous opinions will be forwarded to the. . . Texas Medical Association and Dallas County Medical Association.
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3/12/81	Supplemental Response of Irving ISD to Motion for Sanctions and Request for Immediate Hearing.

3/12/81	Memorandum of Authorities in Support of Response of Irving ISD to Plaintiffs' Motion for Sanctions.
3/13/81	Affidavit of Cindy Guy.
3/27/81	Amicus Curiae Addressing Questions Raised in Order.
3/31/81	Motion of Local Defendants for Leave to File Application for Declaratory Judgment.
5/26/81	Memorandum Opinion . . . State Commissioner of Education, State of Texas, and Texas Education Agency are Dismissed. Members of Board of Trustees are Dismissed in their individual capacities. School district is ordered to modify Amber's IEP to provide for CIC as prescribed by her personal physician. Plaintiffs are entitled to damages, not including attorneys' fees, of $1,271 . . . this court finds reasonable attorneys' fees to be $24,192. In addition, plaintiffs will be awarded reasonable attorneys' expenses of $3,039.
5/26/81	Judgment . . . Ordered that the State Board of Education and Irving ISD modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittment Catheterization . . . Ordered that plaintiffs recover of the Irving ISD their damages and reasonable attorneys' fees and expenses in the sum of $28,502, plus interest at the rate of 9% per annum from this date until paid. Court costs are taxed against defendants.
6/5/81	Irving ISD, defendant's, Motion for Amendment of Findings of Fact to Include Additional Findings and Alter Previous Findings—To Amend Conclusions of Law to Make Additional Conclusions of Law and Alter Previous Conclusions—and for Amendment of Judgment.

9/8/81	Memorandum Opinion.
9/8/81	Amended Judgment . . . Ordered that the State Board of Education and the Irving ISD modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization . . . as prescribed by a valid medical prescription provided by Amber Tatro. Also Ordered that plaintiffs recover of Irving ISD their damages of $1,271, and of the Irving ISD and State Board of Education, jointly and severally their reasonable attorneys' fees and expenses of $27,231, plus interest from 5/26/81 until paid at the rate of 9% per annum. Court costs are taxed against defendants.
9/17/81	Notice of Appeal by Irving ISD.
9/18/81	Motion for Stay.
9/25/81	Order on motion for stay by Irving ISD . . . Court stays enforcement of the award of compensatory damages and attorneys' fees, effective as of the date of filing of the supersedeas bond in the sum of $30,000 in a form approved by the court. The court does not stay the injunctive relief requiring the provision of Clean Intermittent Catheterization.
9/25/81	Notice of Appeal by State Defendants.
10/26/81	Transcript of Proceedings held 3/13/81.
10/26/81	Transcript of Proceedings held 4/23/81.
10/26/81	Transcript of Proceedings held 1/5-6/81, Vol. I.
10/26/81	Transcript of Proceedings held 1/5-6/81, Vol. II., with Exhibits.
1/14/82	Supersedeas Bond.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
CA3-79-1281-G

HENRI and MARY TATRO, *et al*

Plaintiffs

v.

THE STATE OF TEXAS, *et al*

Defendants.

FILED
Jan. 5, 1981
JOSEPH McELROY, JR.,
CLERK
By ? ? ? ? ?
Deputy

PRE-TRIAL ORDER

On the 5th day of January, 1981, came on the parties in the above styled and numbered cause through their respective attorneys of record and agreed to the entry of the following Pre-Trial Order:

1. CONTENTIONS OF THE PARTIES.

a. Summary Of Plaintiffs' Contentions.

Plaintiffs, Henri and Mary Tatro, as next friend of Amber Tatro, contend that the provision of Clean Intermittent Catheterization (C.I.C.) is required to be included in the Individual Education Program (IEP) of Amber pursuant to 20 U.S.C. § 1400 et seq, The Education of All Handicapped Children Act (EACHA), and the regulations promulgated thereunder, in order that the Defendants meet the requirements

under the EACHA regarding the provision of a free appropriate public education. Plaintiffs further contend that they are entitled to injunctive and monetary relief pursuant to 20 U.S.C. § 1415.

Plaintiffs also contend that the provision of C.I.C. is required to be provided Amber under 29 U.S.C. § 794 and the regulations promulgated thereunder. Plaintiffs seek injunctive and monetary relief under 29 U.S.C. § 794.

Plaintiffs further contend that Amber's procedural due process rights under the Fourteenth Amendment have been violated and that they are entitled to monetary relief pursuant to 42 U.S.C. § 1983.

Plaintiffs also seek recovery of attorney's fees under all the above mentioned claims for relief.

Specifically, Plaintiffs contend that C.I.C. is required as a related service under 45 C.F.R. 121a.13, and that Amber is being denied access to a free appropriate public education under 29 U.S.C. § 794.

b. Summary Of Defendants' Contentions.

The Irving Independent School District, The Board of Trustees for the Irving Independent School District, the State of Texas, the Texas Education Agency, and the Texas State Board of Education contend as follows:

> That the Complaint fails to invoke the jurisdiction of the Court pursuant to 29 U.S.C. § 794: that the Complaint fails to state a claim for which relief may be granted pursuant to 29 U.S.C. § 794; that no private cause of action exists in favor of Plaintiffs pursuant to 29 U.S.C. § 794; that 29 U.S.C. § 794 does not create additional financial obligations to recipients of federal funds; that 29 U.S.C. § 794 does not create affirmative action obligations upon State or local recipients of federal funds; that 29 U.S.C. § 794 does not create a private right of action for monetary damages; that the regulations promulgated by

H.E.W. pursuant to 29 U.S.C § 794 exceed the delegated authority which prohibits relief thereunder.

That the Complaint fails to invoke the jurisdiction of the Court pursuant to 20 U.S.C § 1400 et seq.; the Complaint fails to state a claim for which relief may be granted pursuant to 20 U.S.C. § 1400 et seq; that 20 U.S.C. § 1415 does not create a private right of action for monetary damages; that joinder of the Office of Special Education is necessary to complete relief under 20 U.S.C. § 1400 et seq.

That the Complaint fails to state a claim for which relief can be granted under 42 U.S.C. § 1983.

Specifically, Defendants contend that Plaintiff was afforded free appropriate public education as required by 20 U.S.C. § 1400 et seq; 29 U.S.C. § 794, and the regulations promulgated thereunder. That C.I.C. is medical treatment of a diseased state designed to meet individual health needs; that C.I.C. is not required in order that Amber may attend school; that Plaintiff's alleged neurogenic bladder condition is not an educational handicapping condition; that the IEP developed by the Irving Independent School District meets the requirements of the state educational agency and provides a free appropriate public education; that requiring Defendants to provide C.I.C. will impose an undue burden on Defendants; that none of Plaintiff's civil rights or rights guaranteed by the Fourteenth Amendment were infringed; that Plaintiffs have failed to mitigate their damages, if any; that all actions of the Defendants were done in good faith in their official capacity.

The individual members of the Board of Trustees for the Irving Independent School District, the individual members of the Texas State Board of Education, Alton Bowen, and J. F. Townley assert the same contentions as the above-mentioned Defendants and further contend that they all acted in their official capacities and in good faith with regard to Plaintiffs' claims and that they are, therefore, immune from monetary damages.

All Defendants further contend that C.I.C. is medical treatment under state law.

The State of Texas, the Commissioner of Education, the State Board of Education, and all the members thereof further contend that any claim against them is barred by the Eleventh Amendment to the United States Constitution and the doctrines of judicial and legislative immunity.

2. STIPULATED FACTS.

a. Amber was assessed by Irving Independent School District's Admissions, Review and Dismissal Committee to be Orthopedically Handicapped and recommended placement for the school year 1979 in its Early Childhood Development Classes.

b. The parties did not recognize the neurogenic bladder condition as an educational handicapping condition; no specific alternative placement other than the Early Childhood Development Classes were offered nor requested.

c. The IEP does not include any provision for Irving Independent School District providing personnel to perform or furnish clean intermittent catheterization during the school day.

d. Amber Tatro is a four year old female child presented to the Irving Independent School District for education assessment and placement with, among other physical problems, a medically diagnosed neurogenic bladder secondary to myelodysplasia, commonly called "spina bifida," a history of hydrocephalus (excessive water pressure on or in the brain tissue), and a history of myelomeningocele (herniation of the spinal cord and/or nerves).

e. Amber's bladder dysfunction is a direct and proximate result of her "neurogenic bladder," which involves an inability to retain urine with resulting symptoms of constant dribbling or intermittent involuntary emptying of the urinary bladder, and an inability to properly empty the bladder, producing excessive pressure within the bladder and, subsequently, into the uretera and kidney-collecting systems. The medical hazard to Amber is the

back pressure effect, or reflux action, in the bladder and the recurring infection of the urinary tract and/or the kidneys.

f. Clean Intermittent Catheterization (C.I.C.) is a procedure which was introduced in 1972 by Lapides in cases such as Amber's as a means of controlling infection and deteriorating function where the patient is unable to use the bladder sphincter nerves to voluntarily empty bladder contents. Urinary infection and functional deterioration of the kidney can be treated, controlled, or prevented in many cases by this modality. The procedure involves the catheterization of the subject on a regular time sequence to duplicate as closely as possible the normal voiding cycle. C.I.C. is one of several accepted medical treatment modalities which has been successful in the control and management of urinary retention and incontinence for many children.

g. In females, the preparation, materials, and procedure for performing C.I.C. is generally as follows:

1. Equipment and Materials:

(a) Clean catheter in size prescribed by treating physician;

(b) Catheter carrying containers;

(c) Catheter extension when patient is in a wheelchair;

(d) Clear plastic liquid detergent container with a hanger when patient is in a wheelchair;

(e) Soap and water;

(f) Container for catching the urine;

(g) Table or desk on which to place the child;

(h) Large underpad to prevent soaking of liners or other table covering; and

(i) Water soluable lubricant.

(2) Preparation and Procedure:

(a) Get all the equipment and materials ready.

(b) Wash hands with soap and water.

(c) Get the child ready and place her on her back on the table or desk (C.I.C. is easier to perform at table or desk height).

(d) Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction (never working in an upward direction since doing so will move germs from around the rectum up into the area of the bladder opening).

(e) Hold the catheter one inch from the tip and insert it into the urethra until the urine flows.

(f) Hold the catheter in place until the urine stops draining, then push the catheter in another inch or so to be sure the bladder is completely emptied.

(g) Remove the catheter slowly, stopping any time urine flows so as to empty the bladder completely. When the Catheter is ready to come out, hold the catheter tip up so that the urine will drain down from the tip of the catheter and not on you.

(h) After noting and recording the amount of urine obtained, its appearance and any abnormality, discard the urine.

(i) Clean the catheter with soap and water, allow it to dry and place it in a clean, dry envelope. At least once a day after the catheter has been washed with soap and water, place it in a pot of water and boil for 20 minutes. Allow it to air dry and place it in a clean dry envelope.

(j) Catherize at prescribed intervals so that there is never more than 5 ounces (150cc) of urine in the bladder at any one time for a female child of one to five years of age.

(k) Keep a daily record of the time of catheterization, the amount of urine obtained, and if the child is wet, damp or dry.

(l) Do not crede the bladder as it may push urine back into the kidneys.

h. Prior to the development of use of C.I.C., urinary diversion, artificial sphincter inplantation, and/or other methods were used in the management of children with overflow incontinence as the treatment of choice.

The introduction of C.I.C., the artificial urinary sphincter, urodynamics, temporary vesicostemies, neuropharmacology, and rhizotomy have radically altered the management of the urinary tract in children with myelodysplasia.

i. The procedure of C.I.C. is currently considered by most medical centers to be the treatment of choice for the neurogenic bladder condition.

j. Parents can be taught catheterizaton. It takes 30 minutes one day, and that is all they are taught. Amber has been catheterized at home by her parents, teenage sibling, and babysitter, and at Helping Hand Center by her teacher, teacher aide, and the occupational therapist. Teachers have been taught catheterization procedures.

k. With normal intelligence, most children are able to self-catheterize from approximately six to seven years of age, sometimes even earlier.

l. Amber must be catheterized approximately four times per day to avoid a substantial risk to her health.

m. Quite a few children have graduated from Defendant School District without the benefit of catheterization, upon whom conduits were performed which was by far and away the best treatment for them.

n. Intermittent catheterization is probably just a stopgap until better surgical techniques are developed.

o. Number of times catheterization is required per day depends on the bladder capacity and fluid intake and/or retention.

p. Irving Independent School District and The State of Texas and The Texas Education Agency, herein Defendants, receive some federal funds.

q. Possible complications of catheterization, clean or sterile, include septicemia, irritation of the urethra, and bleeding.

r. The Irving Independent School District has never denied Amber enrollment in its Early Childhood Development Classes.

s. Plaintiffs did not seek to enroll Amber in the Defendant School District for the 1980-81 school year.

t. Dr. George Hurt is Amber's physician. He is not employed by the Defendants nor is he a party to any contractual agreement with such Defendants. Dr. Richard Bates is medical consultant to the Defendant School District.

u. Prescribing C.I.C. or other treatment of a neurogenic bladder is the sole responsibility of the treating physician and is a medical function.

v. When a physician delegates a medical function to a nurse or other nonphysician, he must exercise supervision and control. (Texas Board of Medical Examiners' Rule 386.01.13001).

w. An assessment of an individual which identifies a disease as the source of abnormal symptoms constitutes medical diagnosis and is a medical function.

x. C.I.C. is medical treatment.

3. CONTESTED ISSUES OF FACT.

a. Whether Amber can receive and benefit from the educational services prescribed in Irving Independent School District's IEP without C.I.C. being provided by Irving Independent School District.

b. Whether C.I.C. must be administered during school hours;

c. Whether a neurogenic bladder is a handicapping condition which qualifies or requires special education and related services under federal and state laws and regulations;

d. Whether requiring Defendants to provide C.I.C. would constitute an undue burden on Defendants;

e. Whether Plaintiffs are entitled to damages;

f. Whether the State of Texas receives federal financial assistance under 20 U.S.C. § 1400 et seq. in the area of Early Childhood Education;

g. Whether the Texas Education Agency receives federal financial assistance under 20 U.S.C. § 1400 et seq., for Early Childhood Education;

h. Whether the Irving Independent School District receives federal financial assistance under 20 U.S.C. § 1400 et seq., for its Early Childhood Development Program;

i. Whether the State of Texas receives federal financial assistance through the department of H.E.W. (now Health and Human Services) for Early Childhood Education programs pursuant to The Rehabilitation Act of 1973;

j. Whether the Texas Education Agency receives federal financial assistance through H.E.W. for Early Childhood Education programs pursuant to The Rehabilitation Act of 1973;

k. Whether the Irving Independent School District receives federal financial assistance through H.E.W. for its Early Childhood Development program pursuant to The Rehabilitation Act of 1973;

l. Whether the individual Defendants acted in good faith with regard to the actions taken giving rise to this suit;

m. Whether the current Scottish Rite educational evaluation is proper and meets the standards required by PL 94-142 and/or state procedures.

n. Plaintiffs have refused Irving Independent School District's request to complete a current educational education-assessment of Amber.

o. Plaintiffs have refused Irving Independent School District's request for authorization to obtain Scottish Rite Hospital's education, medical, or hospital records.

p. Plaintiffs have not requested any educational services be provided Amber for or during the 1980-81 school year.

4. CONTESTED ISSUES OF LAW.

a. Whether a private cause of action exists pursuant to 29 U.S.C. § 794;

b. Whether 29 U.S.C. § 794 creates additional financial obligations to recipients of federal funds;

c. Whether 29 U.S.C. § 794 creates affirmative actions obligations upon state or local recipients of federal funds;

d. Whether the specific program involved must be shown to receive federal funds pursuant to 29 U.S.C. § 794.

e. Whether 29 U.S.C. § 794 creates a private cause of action for damages;

f. Whether the regulations promulgated by H.E.W. pursuant to 29 U.S.C. § 794 exceed the authority of H.E.W. in that they impose additional financial obligations and affirmative action obligations which prohibit any relief pursuant thereto;

g. Whether the regulations promulgated by the Office of Education pursuant to 20 U.S.C. § 1400 et seq. exceed the authority of H.E.W. in that they impose additional and/or different obligations not created by Congress in enacting 20 U.S.C. § 1400 et seq.

h. Whether 20 U.S.C. § 1400 et seq. creates a private right of action for damages;

i. Whether the joinder of Bureau for Education and Training of Handicapped (B.E.H.), now Office of Special Education, must be joined as a party hereto pursuant to Rule 19 FRCP.

j. Whether the Irving Independent School District is authorized under state law to provide and furnish medical treatment, deliver health care services, and specifically assume the responsibility of furnishing C.I.C.

k. Whether C.I.C. is a developmental, corrective, supportive, or evaluative service not instructional in nature that is required for Amber to benefit from the instructional program and to fulfill the requirements of the student's individual educational plan.

5. PENDING MOTIONS.

a. The State Defendants have a Motion for Leave to File an Amended Answer;

b. Motion to Dismiss of the State Defendants;

c. The local Defendants have a Motion for Leave to file an Amended Answer;

d. Motion to Dismiss of all Defendants; and

e. Motion to Dismiss of Defendant Townley.

6. EXHIBITS, WITNESSES AND DEPOSITIONS.

a. *Plaintiff's Witnesses and Exhibits:*

(1) Witnesses:

(a) Mary Tatro

(b) Gordon Williamson*

(c) John Townley

(d) George Hurt*

(e) T. Richard Handler*

*It is possible that due to a scheduling conflict, another witness may need to be substituted; the Court will be advised at the earliest time.

(2) Exhibits:

(a) Transcript and exhibits from the Impartial Due Process Hearing, June 19, 1979.

b. *Defendant Irving Independent School District's Witnesses and Exhibits:*

(1) Witnesses:

(a) Dr. Richard Bates, M.D.

(b) Robert J. Pierce

(c) John F. Townley

(d) Lois DeAndrea

(e) Cindy Guy

(f) Brooks Teague

(g) Clifton McNeely

(h) Betty Howe

(i) Rosemarie Klassen

(j) Dr. Elgin Ware

(k) Dr. John Shilling

(l) Dr. Stephen Bell

(m) Dr. George Hunt

(n) Blanche Carpenter

(o) Dawn Morrell.

(2) Exhibits:

(a) Transcript and exhibits from the Impartial Due Process Hearing, June 19, 1979; record of Commissioner of Education; record of State Board of Education

(b) Texas Education Agency Rule 226.34.13.010 concerning school health services program

(c) Texas Education Rule 226.35.73.022 concerning school health services and the Special Education Program

(d) "Clean Intermittent Catheterization Program," Position Paper; *Wisconsin Department of Public Instruction, Division for Handicapped Children, and Bureau for Crippled Children*

(e) Written orders and/or instructions of Dr. George Hurt for C.I.C. and medication or other orders in the care and treatment of Amber Tatro

(f) Student test records, evaluation summaries, student referrals, ARD Committee summaries, medical and hospital records of Amber Tatro in Irving Independent School District's eligibility folder pertaining to Amber Tatro

(g) Medical, hospital and educational records concerning Amber Tatro of Scottish Rite Crippled Children Hospital

(h) Texas Education Memorandum of October 22, 1980, entitled "*Classifications of Policies and Administrative Procedures for the Education of Handicapped Students*," ADO 871 01, 35.74.060, Provision of Services for Students Placed by Their Parents in Private Schools

(i) Irving Independent School District's *Job Description for School Nurses*

(j) Educational, medical and catheterization records of Special World Day Care Center concerning Amber Tatro

(k) Educational, medical and catheterization records of Helping Hand School concerning Amber Tatro

(l) Logs and records maintained by Plaintiffs reflecting dates, times, urine volume obtained and its condition of catheterization of Amber Tatro

(m) Irving Independent School District policy on administering medication

7. ESTIMATED LENGTH OF TRIAL.

The estimated length of trial is three (3) days.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM,
United States District Judge

APPROVED:

/s/ Martha H. Allan
MARTHA H. ALLAN
Attorney for The State of Texas
and State Defendants

/s/ Craig T. Enoch
CRAIG T. ENOCH,
Attorney for Plaintiffs

/s/ James W. Deatherage
JAMES W. DEATHERAGE,
Attorney for Irving Independent
School District and Local
Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO.
CA-3-79-1281-G

HENRI and MARY TATRO, *et al.*,

Plaintiffs

v.

STATE OF TEXAS, *et al.*,

Defendants

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 5 1981
JOSEPH McELROY, JR., CLERK
By _____
Deputy

MOTION FOR AMENDMENT OF FINDINGS OF FACT TO INCLUDE ADDITIONAL FINDINGS AND ALTER PREVIOUS FINDINGS—TO AMEND CONCLUSIONS OF LAW TO MAKE ADDITIONAL CONCLUSIONS OF LAW AND ALTER PREVIOUS CONCLUSIONS—AND FOR AMENDMENT OF JUDGMENT

Irving Independent School District, one of the Defendants herein, requests the Court pursuant to Rules 52 and 59 F.R.C.P. to amend its previous findings of fact to include additional findings, to alter previous findings, to amend its previous conclusions of law, to make additional conclusions, to alter previous conclusions and to amend the Judgment of the Court, said findings and conclusions being contained in the Judgment and Memorandum rendered by the Honorable Pat-

rick E. Higginbotham, District Judge, on May 26, 1981, in this action:

REQUESTED ADDITIONAL FINDINGS OF FACT

Irving Independent School District requests the Court to make the following additional findings of fact:

1. Defendants, the State of Texas, the Texas Education Agency, and the State Board of Education are responsible for administering federal funds received pursuant to Title VI-Part B, Education of All Handicapped Children Act of 1975 (EACHA), 20 U.S.C. § 1401 *et seq.*, in the State of Texas.

2. Amber Tatro became eligible for Special Education Services through Irving Independent School District's Early Childhood Development Program for handicapped children in August, 1979, because of an orthopedic handicap which adversely affected her educational performance.

3. Amber is medically diagnosed to suffer from a "neurogenic bladder" which involves an inability to retain urine with resulting symptoms of intermittent, involuntary dribbling of urine from the bladder, and inability to completely empty the bladder, which produces excessive pressure within the bladder and, subsequently, into the ureter and kidney collecting systems. The medical hazard to Amber is the back pressure effect, or reflux action, in the bladder and the risk of infection to the urinary tract and/or the kidneys.

4. Possible complications of catheterization, clean or sterile, include septicemia, irritation of the urethra, and bleeding.

5. Because of Amber's orthopedic handicap, the Irving Independent School District's Admission, Review and Dismissal (ARD) Committee developed an individual education program for Amber which included specially designed instruction to meet the unique needs of her education handicapping condition, and related services necessary for her to benefit from the instruction specially designed for her, and recommended the program be carried out and im-

plemented in an Early Childhood Development class conducted from 8:30 o'clock a.m. to 11:15 o'clock a.m., each day.

6. The State Board of Education, after administrative proceedings, by order dated September 8, 1979, found as follows:

   (1) "Based upon the evidence and foregoing findings of fact, we conclude that CIC is medical treatment of a disease state.

   (2) Based upon the evidence and foregoing findings of fact, we conclude that the IEP developed by the District's ARD Committee meets the standards of the State Educational Agency and provides the child in question a Free Appropriate Public Education within the intent and meaning of applicable statutes and regulations."

7. The State of Texas and the Texas Education Agency adopted a plan pursuant to EACHA which plan was approved by the Commissioner of Education.

8. Irving Independent School District complied with the State Plan and the order of the State Board of Education.

9. Plaintiffs did not attack the State Plan as not providing for a free appropriate education pursuant to EACHA.

10. Plaintiffs did not provide Irving Independent School District with a sufficient parental consent for medical treatment until after the March 13, 1981, hearing on Plaintiff's Motion for Sanctions.

11. Plaintiffs did not provide Irving Independent School District with a valid medical prescription authorizing the requested CIC until after the March 13, 1981, hearing on Plaintiff's Motion for Sanctions.

12. Irving Independent School District never refused to provide occupational therapy and physical therapy which it would have been required to provide upon request (see Defendant's EXHIBIT NO. 9) and Amber's failure to receive same resulted from her parents' refusal to enroll her or to request such services at home, in nursery school,

Helping Hand Development Center or elsewhere. (See also 34 C.F.R. 121a.347 and 121a.348)

13. Without a valid medical prescription, school personnel would have been in violation of the Texas Medical Practices Act by performing CIC.

14. Requiring the Irving Independent School District to provide CIC would require substantial adjustments in its existing programs.

15. Requesting the Irving Independent School District to provide CIC would impose upon the district additional financial and administrative obligations.

16. Requiring the Irving Independent School District and its employees to provide CIC would impose additional obligations upon the district due to the uncertainty of existing state law with regard to liability for carrying out delegated medical tasks.

17. Requiring the Irving Independent School District to provide CIC would require the district to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school.

18. Plaintiffs did not show that the Irving Independent School District receives funds for its Early Childhood Education for handicapped students program nor for its school health services.

19. The regulations promulgated by the Texas Education Agency pursuant to legislative authority define the term "qualified school nurse."

20. A school nurse can perform only those tasks authorized by the Central Education Agency of the State of Texas.

21. CIC should be provided only under the orders or direction (valid medical prescription) of a licensed physician. In addition to determining if and when CIC is appropriate treatment, the following services of the licensed supervising physician are required:

    (A) The physician continues to monitor the progress of the patient.

(B) He must determine if the treatment is being properly performed and is progressing without complication.

(C) He must determine the extent of supervision or control which is proper from time to time.

(D) He must determine the needs and capabilities of the patient.

(E) He must determine the training, experience, and competence of the person who will be performing his prescribed procedure.

(F) He must assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure.

(G) Physician supervision is vital to minimize the likelihood and severity of complications and to insure proper maintenance and sterilization of the equipment used.

(H) He must be sure the person performing the procedure is trained to perform it properly and is taught to recognize conditions which should be brought to his attention.

(I) When delegating performance of the procedure, he must ensure that his instructions are sufficient to match the individual's training and tailor his instructions to a pre-established level of the training of that person.

(J) He must be available at all times to the person he delegates the performance of the procedure for advice and consultation.

(K) He must have the right of control over the person to whom he delegates the performance of the procedure.

(L) A physician's prescription is required for obtaining the appropriate catheter as it is a "prescription device" under FDA regulations.

22. Amber's physician, Dr. George Hurt, testified that he would not be responsible or accept responsibility for the actions of school personnel in performing CIC.

23. Irving Independent School District did not solely by reason of her handicap subject Amber to discrimination under any program or activity of the district which received federal financial assistance. (No valid medical prescription was provided.)

24. Irving Independent School District did not solely by reason of her handicap exclude Amber from any program or activity of the district which received federal financial assistance.

25. Irving Independent School District did not solely by reason of her handicap deny Amber the benefits of any program or activity of the district which received federal financial assistance.

REQUESTED ALTERED AND AMENDED FINDINGS OF FACT

1. CIC is not a "school health service" under Texas Law or the Texas Regulations pursuant to T.E.A. Policy 35.73.023.(1)(c)(iii)(XIII) *Policies and Administrative Procedures For the Education of Handicapped Students* which policies were approved as the State Plan and which control pursuant to this Court's decision.

2. Amber does not require CIC between the hours of 8:30 a.m. and 11:15 a.m. in order that she may benefit from special education (Plaintiffs did not prove by a preponderance of the evidence that CIC was necessary during school hours as required by the opinion of the Fifth Circuit Court of Appeals).

3. Dr. Hurt nor any other qualified physician testified that failure to provide CIC between the hours of 8:30 a.m. and 11:15 a.m. would in a reasonable medical probability create a substantial risk to Amber's health.

4. The majority of Plaintiffs' attorneys' time was spent in administrative hearings and appeals pursuant to EACHA and not in an attempt to enforce 29 USC § 794 (§ 504) which enforcement is not within the jurisdiction of the Texas Education Agency or the State Board of Education.

5. The relief obtained by Plaintiffs was not through the efforts of Plaintiffs' attorneys.

6. Any violation of the EACHA by the Irving Independent School District was as a result of compliance with the orders of the State Board of Education and the compliance with the State Plan which had been approved by the Commissioner of Education pursuant to the EACHA.

REQUESTED AMENDED AND ADDITIONAL CONCLUSIONS OF LAW

1. Irving Independent School District is not liable in damages or attorneys' fees for compliance with the order of the State Board of Education and compliance with the approved state-wide plan. (Alternatively, if the Court does not withdraw its decision, damages and attorneys' fees should be taxed against the State Board of Education.)

2. No relief can be granted without the State of Texas and Texas Education Agency whose plan Irving Independent School District implemented.

3. There being no attack upon the State Plan with which Irving Independent School District complied, there was no violation shown and no relief is available without the State of Texas and Texas Education Agency. (See Plaintiffs' Memorandum in Support of Plaintiffs' Cause of Action Against State Defendants, pp. 3,4.) There being no attack upon the State Plan or relief requested, as a result of said plan violating EACHA, there can be no recovery against the Irving Independent School District.

4. CIC is medical treatment no matter by whom or in whose presence it may be performed.

5. CIC is not a "school health service" and thus a "related service" under State Law because such interpretation would require medical services for purposes other than for diagnostic and evaluation purposes.

6. CIC is not a school health service and thus a related service under the EACHA because such interpreta-

tion would require medical services for purposes other than for diagnostic and evaluation purposes. (The stipulation that CIC is medical treatment was not before the Fifth Circuit.)

7. EACHA does not create substantive rights, only procedural rights.

8. EACHA does not create a right to medical treatment for health conditions of handicapped children.

9. Regulations implementing the EACHA and § 504 of the Rehabilitation Act stop short of Requiring medical treatment whether or not it is provided by a physician or a nurse. Where residential placement is required, medical treatment and care if specifically omitted from the services required to be provided at no cost to the parent. [(34 C.F.R. 121a.302 and 34 C.F.R. 104.33(c)(3).] Thus the regulations do not contemplate the requirement of providing medical treatment in order to benefit from special education, whether it be by a licensed physician or a qualified school nurse.

10. Regulations implementing the EACHA exceed the authority granted by the statute if interpreted so as to create a substantive right to medical treatment under the definition of "school health services" when the statute specifically limits the medical services to those for diagnostic and evaluation purposes only. Therefore, CIC is not a "related service."

11. Absent a valid medical prescription, Irving Independent School District could not administer CIC, and all retrospective relief is denied. (The parties agreed that CIC could not be provided without a valid medical prescription.)

12. There being no evidence that the Irving Independent School District Early Childhood Education Program is federally assisted, no relief can be granted pursuant to Section 504.

13. Even assuming that the evidence was sufficient to show that Irving Independent School District Early Childhood Education Program is a federally assisted program, there was no evidence that Section 504 was violated and no attorney's fees may be recovered.

14. Imposing additional administrative and financial obligations upon Irving Independent School District with regard to liability for negligence of school district employees performing services in conformity with a valid medical prescription imposes an undue financial and administrative burden on the district and is thus not required by Section 504.

15. Requiring the Irving Independent School District to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school would impose undue financial and administrative burdens on the district which are not required by Section 504.

16. Requiring the Irving Independent School District to make substantial adjustments in its existing programs in order to provide CIC is not required by Section 504.

17. Section 504 does not create a right to medical treatment for health conditions.

18. Section 504 does not create additional financial obligations or affirmative action obligations on recipients of federal funds.

19. Providing CIC would impose additional financial and affirmative action obligations upon Defendants and is not required by Section 504.

20. The EACHA does not create a private right or action for damages.

21. Plaintiffs are not entitled to attorneys' fees pursuant to Section 504 since no violation of such section was proved.

22. Plaintiffs are not entitled to attorneys' fees for time, preparation and expense incurred in the administrative proceedings under EACHA since attorneys' fees are not recoverable under EACHA and the administrative proceedings could not occasion relief pursuant to Section 504.

This Motion is based on the files, records, transcripts and evidence herein.

WHEREFORE, Defendant, Irving Independent School District, prays that the Court:

1. Make the additional findings of fact as requested herein;
2. Alter its previous findings of fact as requested herein;
3. Make the additional conclusions of law requested herein;
4. Alter its previous conclusions of law as requested herein; and
5. Amend the judgment and deny Plaintiffs all relief requested; or alternatively
6. Amend the judgment to allow recovery of $1,271.00 against the State Board of Education and no recovery of attorneys' fees; or alternatively
7. Amend the judgment to provide recovery of $1,271.00 plus attorneys' fees in relation to the Section 504 claim only, such judgment being against the State Board of Education; or alternatively
8. Amend the judgment to provide recovery of $1,271.00 plus attorneys' fees against the State Board of Education as opposed to the Irving Independent School District.

Respectfully submitted,

DEATHERAGE & WEAVER

By James W. Deatherage
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By O. Glenn Weaver
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NOTICE OF MOTION

TO: Mr. Craig Enoch, Moseley, Jones, Enoch & Martin, Attorneys at Law, 6060 North Central Expressway, Suite 850, Dallas, Texas 75206 and

Ms. Martha Allen, Assistant Attorney General, Supreme Court Building, Austin, Texas 78711

Please take notice that on _____, 1981, at _____ o'clock ___.m. or as soon thereafter as counsel can be heard, in Room ____ United States Courthouse, 1100 Commerce, Dallas, Texas, the undersigned will bring the above motion on for hearing.

DATED this ____ day of _____, 1981.

DEATHERAGE & WEAVER

By James W. Deatherage
JAMES W. DEATHERAGE
SBC# 05701000
201 Southwest Bank Building
Irving, Texas 75061
(214) 254-3188

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Amendment of Findings of Fact to Include Additional Findings and Alter Previous Findings—To Amend Conclusions of Law, To Make Additional Conclusions of Law and Alter Previous Conclusions—and for Amendment of Judgment and Notice of Hearing was mailed by

certified mail, return receipt requested, with postage thereon paid in full, on this ____ day of June, 1981, to:

Mr. Craig T. Enoch
Moseley, Jones, Enoch & Martin
Attorneys at Law
6060 North Central Expressway; Suite 850
Dallas, Texas 75206

and

Ms. Martha Allen
Assistant Attorney General
Supreme Court Building
Austin, Texas 78711

James W. Deatherage
JAMES W. DEATHERAGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually,
and as Next Friend
of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

From The United States District Court
For The Northern District Of Texas
Dallas Division

PETITION FOR REHEARING OF IRVING INDEPENDENT SCHOOL DISTRICT, APPELLANT

JAMES W. DEATHERAGE
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200-201 InterFirst Bank Building
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Attorneys for Appellant,
Irving Independent School District

May 9, 1983

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually, and as Next Friend of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellant Procedure, IRVING INDEPENDENT SCHOOL DISTRICT, Appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, Appellant represents to the Court as follows:

1. It is the Appellant's opinion the Panel has misapprehended the binding effect and authoritative nature of *Tatro I* in applying the "law of the case" principles to the subject appeal and has overlooked the fact *Tatro I* was in the nature of an advisory opinion "based upon a hypothetical state of facts." (See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229 (1937).

Tatro I involved an appeal from a denial of a preliminary injunction in which the Panel held the District Court did not make specific findings of fact, or at least insufficient findings. The Fifth Circuit has consistently refused to review cases of

such nature because of incomplete and inconclusive records. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1970). As the Panel in *Davis* said at p.1141,

> "In the words of the Supreme Court, a full and fair compliance with Rule 52(a) is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction." Citing *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940).

The fact that *Tatro I* assumed the facts and a subsequent Panel feels bound by it, illustrates the reasoning behind the rule. Requiring public school districts to secure the services of persons sufficiently trained to allow a physician to prescribe his preferred medical treatment is of such public importance that the Panel should reconsider its holding that *Tatro I* is not clearly erroneous and does not work manifest injustice on the Texas public schools.

2. In holding that *Tatro I*, 625 F.2d 557 (1980), is the authoritative interpretation of The Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401(17)(1976), the Panel has overlooked substantial evidence which is substantially different from the facts assumed in *Tatro I*. Specifically, the Panel has overlooked the various services of a licensed physician which are required for the physician's delegatee to perform the delegated medical task, and which services are not for evaluation or diagnostic purposes.

The necessary services required of a licensed physician, none of which were addressed in *Tatro I*, include the following:

> (a) The physician must prescribe the medical treatment to be delivered. If the Appellant's employees provided the medical treatment involved in this case without a valid doctor's prescription, they would violate the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, Art. 4495 et seq. (Vernon 1976), codified in Texas' new Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, Art. 4495b et seq. (Vernon Supp. 1982-1983). See Pre-trial Order (App.82); the joint brief of the Texas Medical Association and the Dallas County Medical Society as amicus curiae reprinted as an appendix to the District Court's opinion on remand,

516 F.Supp. at 987; and the findings of the District Court to this effect (App.44).

(b) When delegating prescribed medical treatment, the physician must

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure;

(4) determine if the treatment is being properly performed and is progressing without complication;

(5) monitor the patient's progress and perform the numerous physician duties discussed in amicus brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand, 516 F.Supp. at 987.

Thus it is clear extensive services of a licensed physician are required to administer the prescribed medical treatment. Therefore, the medical treatment prescribed is not a "related service" as defined at 20 U.S.C. § 1401(17), 45 C.F.R. § 121a.13(a), nor is it a required "Medical Service" as defined at 45 C.F.R. § 121a.13(b)(4). Since the public school employee cannot administer the prescribed medical treatment without a valid physician's prescription and other services of a licensed physician, the public school employee is not a "qualified person" as contemplated in the definition of "school health services" at 45 C.F.R.
121a.13(b)(10).

(c) The Panel further overlooked or misapprehended the Appellant's position concerning the physical presence of the physician in its opinion at p.4010.

This has never been the Appellant's position. It has been the Appellant's position throughout these proceedings the physician could not lawfully prescribe medical

treatment and delegate its administration to the public school unless he adequately supervised, controlled, and assumed the responsibility for the person performing the delegated medical tasks; and the public school could not, therefore, lawfully provide the medical treatment (at least in the absence of adequate prescription, delegation, supervision, and assumption of responsibility, without running afoul of The Texas Medical Practice Act and Texas Education Agency's Policies and Procedures governing school health services). See the Panel's quote of *Tex. Rev. Civ. Stat. Ann.*, Art. 4495b § 3.07(i) (Vernon Supp. 1982-1983) at the beginning of p.4011 of its opinion.

The District Court was vitally concerned regarding the extent of the physician's control and supervision. It, therefore, requested an amicus brief from Texas Medical Association in which it requested the Amicus address the nature and extent of supervision and control.

If the delegatee acts with knowledge that the delegation and action thereunder is a violation of the Medical Practice Act, the delegatee may be guilty of practicing medicine without a license (p.4011 of the Panel's opinion). It is therefore the Appellant's opinion the EAHCA nor § 504 of the Rehabilitation Act mandates and requires the public school assume such risk nor be required to interpret and construe such Act in developing an appropriate IEP for a handicapped child. *Tatro I* did not address these issues, and the Appellant believes the Panel should reconsider its decision in light thereof.

3. The Panel also overlooks the evidence offered by the Appellee's physician, Dr. Hurt, who prescribed the treatment in question. Dr. Hurt testified he did not supervise or control any of the Appellant's employees (Tr.253, 276), that he did not direct any of its employees (Tr.276), and that he would not assume the responsibility for supervision and control over any school employee (Tr.253, 276). These facts were also not among the assumed facts in *Tatro I*, and substantially differ from those it assumed.

Having overlooked these facts and their importance, it is the Appellant's opinion the Panel misapprehended Texas law concerning delegation of medical tasks when applied to these

facts. In this regard, the Panel is referred to its cited authorities on pps.4010 and 4011 of its opinion requiring the delegating physician to supervise and assume control of the employee and to remain responsible for the medical acts of the person performing the delegated medical acts, all of which Dr. Hurt refused to do.

4. In holding that the prescribed medical treatment is a "related service," the Panel overlooks an important part of the *Tatro I* opinion which it held to be the "law of the case."

The *Tatro I* Panel held at 625 F.2d at 562-63:

> Excluded from the term "related services" are those *health-related activities which must be performed by a licensed physician* that are not provided "to determine a child's medically-related handicapping condition which results in the child's need for special education and related services." (Emphasis added.)

Since neither the public school nor its employees can lawfully provide and furnish the prescribed medical treatment without the services of a licensed physician, hereinabove enumerated, the prescribed medical treatment is excluded from the term "related services" by the holding in *Tatro I*.

5. In discussing the role of the Individualized Education Program ("IEP") at pps.4012-4014 of its opinion, it is Appellant's belief the Panel has overlooked and misapprehended the meaning and required content of the IEP as construed and applied by the U.S. Supreme Court in *Board of Education* v. *Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3048 (1982) and as provided at 45 C.F.R. 121a.346. The required content of the IEP does not include the setting or "placement" in which the IEP is to be implemented. The Panel overlooks the fact the Early Childhood Development class ("ECD") is only a "placement" and not a part of the IEP.

If, in selecting the least restrictive environment for "placement," there is found any potential harmful effect on the child, the placement is obviously not appropriate, 45 C.F.R. § 121a.552(d). The District Court found a potential risk and

hazard to the Appellee if placed in ECD without the medical treatment. As we have subsequently learned through *Rowley* at 3051 and 3045, fn 21, the Court should not have modified the IEP but remanded the case back to the school district to consider an alternative setting and suitable environment in which the IEP could safely be implemented. The Panel should, therefore, reconsider its decision as to the authoritative nature of *Tatro I* as "law of the case" in view of *Rowley*.

6. In affirming the decision of the District Court, the Panel has overlooked the definition of "free appropriate public education" ("FAPE"), which includes special education and related services which meet the standards of the State educational agency. 20 U.S.C. § 1401(18), as discussed and applied in *Rowley*, at 3041-3049. *Tatro I* did not address these standards and cannot be considered as "law of the case"; particularly in view of *Rowley*, *supra*. Further, the District Court nor the Panel has made any finding or holding that the FAPE offered or provided did not meet the standards of the State educational agency. Perhaps it is so because the Appellee has never asserted the special education and related services failed to meet such standards.

7. In holding that the Appellants violated § 504 of the Rehabilitation Act of 1973, the Panel, in awarding attorney fees pursuant to 29 U.S.C. § 794a(b), overlooks and misapprehends the asserted violation is solely a result of interpreting a provision of the EAHCA. The Panel and the District Court have both held the Appellant was entitled to require a detailed prescription and instructions tailored to the particular needs of each individual child before it is required to provide the prescribed medical treatment. The Panel discusses the required contents of the prescription and instructions at p.4012 of its opinion and in fn 5.

The District Court found the Appellant could not provide the medical treatment requested without a valid medical prescription (App.44), and that a valid prescription and consent were never furnished the Appellant until after April 23, 1981,

following trial on the merits (App.53, 54). Therefore, the Panel should reconsider its decision in view of these findings and determine when these Appellants violated any requirements of § 504. Since this issue nor these facts were before the Court in *Tatro I*, that Panel's decision should not be considered as controlling of the question.

8. The Panel has overlooked the fact the Appellee was the prevailing party under EAHCA, not the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1976). But for the advisory opinion in *Tatro I* interpreting 20 U.S.C. § 1401(17) and 45 C.F.R. 121a.13(b)(10), the Appellees would not have prevailed at all. Since EAHCA does not provide for attorney fees, the Panel should reconsider its affirmance of the District Court's decision in that regard since Appellee was not a prevailing party under the Rehabilitation Act, but under EAHCA.

On March 24, 1983, in *Thomas F. Smith, Jr., et al* v. *Cumberland School Committee*, ____ F.2d ____ (1st Cir. 1983), Doc. No. 82-1524, a sister court of appeals has refused to award attorney fees because the Plaintiffs prevailed under EAHCA and not the more general civil rights laws.

9. This appeal involves fundamental issues of exceptional importance to the public and affects the operation of the entire public school system of Appellant. The decision of this court on this appeal will have a vital effect on such school system and on other public school systems throughout the 5th Circuit, if not the nation. It is, therefore, appropriate that the Panel reconsider its decision and withdraw its opinion.

WHEREFORE, the Irving Independent School District, Appellant, requests that a rehearing of the appeal in the above-entitled cuase be granted; the Panel's opinion dated April 25, 1983, be withdrawn; and the Court enter a new opinion revers-

ing the judgment of the District Court or, in the alternative, vacate and remand for further proceedings.

Respectfully submitted,

/s/ James W. Deatherage
JAMES W. DEATHERAGE
200-201 InterFirst Bank Building
Irving, Texas 75061
(214) 254-3188

Attorneys for Irving Independent School District, Appellant

CERTIFICATE

As counsel for the Irving Independent School District, Appellant, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ James W. Deatherage
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200-201 InterFirst Bank Building
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(214) 254-3188

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing of Appellant, Irving Independent School District, has been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751; to Ms. Martha H. Allan, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; and to Mr. Tally F. Parker, Jr., 300 InterFirst Bank Building, Irving, Texas, 75061, on this the 9th day of May, 1983.

/s/ James W. Deatherage
JAMES W. DEATHERAGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually,
and as Next Friend
of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

From The United States District Court
For The Northern District Of Texas
Dallas Division

SUGGESTION OF EN BANC CONSIDERATION ON REHEARING OF IRVING INDEPENDENT SCHOOL DISTRICT, APPELLANT

U.S. COURT OF APPEALS
RECEIVED
MAY 9 1983
NEW ORLEANS, LA.

JAMES W. DEATHERAGE
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Attorneys for Appellant,
Irving Independent School District

May 9, 1983

CERTIFICATE OF INTERESTED PERSONS

No. 81-1454—Tatro v. The Irving Independent School District

The undersigned counsel of record certifies that the following-listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

APPELLANTS:

Irving Independent School District and its Board of Trustees: Roger Hill, Robert Pierce, Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes, and Dr. James W. Filbeck; John F. Townley, Superintendent of Schools, Irving Independent School District.

POSSIBLE APPELLANTS AND/OR APPELLEES:

State of Texas, Texas Education Agency, State Board of Education and its members: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William R. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; Alton Bowen, Raymond Bynum, present Commissioner of Education.

APPELLEES:

Henri Tatro, Mary Tatro, and Amber Tatro, a minor.

/s/ James W. Deatherage
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DEATHERAGE & WEAVER
200-201 Interfirst Bank Building
Irving, Texas 75061
(214) 254-3188
Attorneys for Appellant,
Irving Independent School District

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decision(s) of the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Southeastern Community College v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979)

Pennhurst State School and Hospital v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981)

Board of Education v. *Rowley*, ___ U.S. ___, 102 S.Ct. 3034 (1982)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Does the Education of All Handicapped Children Act require public schools to deliver *medical treatment* as may be ordered by a physician?

2. Does § 504 of the Rehabilitation Act of 1973 obligate public schools to take sufficient affirmative steps necessary to enable a physician to prescribe and delegate *medical treatment* for a handicapped child?

3. Is a decision of a single panel, in the nature of an advisory opinion, dispositive of these questions?

/s/ James W. Deatherage
JAMES W. DEATHERAGE
Attorney of Record for Appellant, Irving Independent School District

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STATEMENT OF THE ISSUES

1. In view of *Pennhurst* and *Rowley*, what substantive obligations does The Education for All Handicapped Children Act impose on public schools to provide medical and health care for their handicapped students?

2. In view of *Southeastern Community College* v. *Davis* and *Pennhurst*, what is the extent of any affirmative obligations imposed by § 504 of the 1973 Rehabilitation Act on public schools in providing a free appropriate public education?

3. Is the decision of the Panel in *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980), the law of the Fifth Circuit since the subsequent decisions of the U.S. Supreme Court in *Pennhurst* and *Rowley?*

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This is Amber Tatro's second appearance before this Court. The facts and procedural history of this case are reported in detail in *Tatro I*, 625 F.2d 557 (1980), and in those of the District Court, 516 F.Supp. 968 (1981); 481 F.Supp. 1224 (1979). We will briefly summarize them here.

In early 1979, when Amber was 3½ years old, her mother asked the Irving Independent School District to provide special education for Amber. The School District agreed, and in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber. The IEP did not provide for clean intermittent catheterization ("CIC") which, subsequent to *Tatro I*, was stipulated by the parties and found by the District Court to be *medical treatment* requiring a valid prescription of a physician and other physician's services. The School District, Appellant, maintained it had no legal obligation to provide for nor administer CIC.

Amber's parents pursued an administrative appeal through the Texas State Board of Education which agreed with the

School District's decision, holding Amber's IEP met the standards of the State educational agency and complied with applicable statutes and regulations.

The Tatros then brought the present action in Federal District Court pursuant to 20 U.S.C. § 1415(3)(2) (1976), contending that the School District violated the EAHCA and § 504 of the Rehabilitation Act of 1973 prohibiting discrimination against the handicapped in federally-funded programs.

The District Court denied the Tatros' motion for preliminary injunction to require the School District to provide CIC. 481 F.Supp. at 1229.

The Tatros then appealed from the District Court's order to the United States Court of Appeals for the Fifth Circuit (*Tatro I*). With no facts to speak of, and no findings upon which to rely for review, the Panel in *Tatro I* reversed. *Tatro I*, 625 F.2d at 558 n.1, 562. Based upon its assumed facts, *Tatro I* held that CIC was a "related service" required to assist a handicapped child to benefit from special education (citing 20 U.S.C. § 1401(17) (1976)). *Tatro I* further held that the School District's refusal to provide CIC violated § 504.

On remand, the District Court, feeling constrained by *Tatro I*, ordered the Irving Independent School District to modify Amber's IEP to include the provisions for CIC "in accordance with and as prescribed by a valid medical prescription provided by Amber." Although the District Court believed *Pennhurst* reinforced the District Court's doubts that § 504 required the provision of CIC, the Court felt sufficiently constrained by *Tatro I*, and without finding a specific violation of § 504, awarded Appellees attorneys fees pursuant to 29 U.S.C. § 794a(b). The School District perfected the present appeal to this Court.

On April 25, 1983, the Panel in the present appeal AFFIRMED the decision of the District Court, following the general rule that one panel of the court does not overrule another panel.

STATEMENT OF FACTS

Amber Tatro is a seven-year-old girl afflicted with myelomeningocele, a birth defect resulting in orthopedic impediments, some speech impairment, and a neurogenic bladder. The neurogenic bladder condition prevents voluntary emptying of the bladder. The *medical treatment* of choice chosen by Amber's doctors for *treatment* of the bladder condition was clean intermittent catheterization ("CIC") and medication which must be administered several times daily to prevent injury and infection.

When Amber was 3½ years old, her mother requested the Irving Independent School District, Appellant, to provide special education for Amber. The School District agreed and, in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber pursuant to provisions of State law, State policies and procedures, and The Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401(19), 1414(a)(5) (1976). Amber qualified for special education because of her orthopedic handicap. The IEP developed for Amber included physical therapy and occupational therapy due to her orthopedic impairment which had delayed development of growth and fine motor skills, and some speech therapy.

The educational "placement" or setting recommended for Amber was in the School District's Early Childhood Development Class ("ECD"), which class was scheduled for 2 hours and 45 minutes each school day. The IEP did not include providing Amber with *medical treatment* for the neurogenic bladder.

Amber's parents, Appellees, thereafter filed a complaint with the State educational agency pursuant to the provisions of 20 U.S.C. § 1415(b)(2), because the IEP, defined at 20 U.S.C. § 1401(19), did not include provisions for treating Amber's neurogenic bladder as a "related service". The administrative proceedings of the State educational agency resulted in an order September 8, 1979, to the effect that the requested treatment of Amber's neurogenic bladder was *medical treat-*

ment of a diseased state, and that the IEP developed by the School District met the standards of the State educational agency and provided the child in question a free appropriate public education ("FAPE") within the intent and meaning of applicable statutes and regulations (Tr.p.135, P.Ex.5).

After exhausting State remedies, the Tatros brought the present action in Federal District Court pursuant to 20 U.S.C. § 1415(e)(2) (1976), contending that the School District violated the EAHCA by failing to provide Amber with a FAPE, *Id.* § 1412(1). Specifically, they argued that the requested services for Amber were a "related service" the State and local School District must provide to fulfill their duties to Amber under the School District's refusal to provide the services violated § 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the handicapped in federally-funded programs. 29 U.S.C. § 794 (Supp. V 1981).

The District Court denied the Tatros' motion for a preliminary injunction to require the School District to provide the services for Amber's neurogenic bladder. 481 F.Supp. at 1229. The District Court concluded that the services were not a "related service" within the meaning of the EAHCA because they were not related to special education and the need for it "does not arise from the effort to educate". *Id.* at 1227. The District Court further concluded that the Tatros "cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs", and therefore § 504's prohibition of discrimination does not impose a duty upon the School District to take affirmative action to care for Amber's neurogenic bladder. *Id* at 1228-29.

The Tatros appealed from the District Court's order; and based upon facts the Panel assumed for purposes of reveiw, it VACATED and REMANDED. *Tatro I*, 625 F.2d at 558 n.1, 562. The Panel in *Tatro I* held the services requested fell within the literal terms of the statutory definition of "related servies",

which includes "supportive services . . . as may be required to assit a handicapped child to benefit from special education." *Id.* at 564 (citing 20 U.S.C. § 1401(17) (1976)). Because, under the Panel's assumed facts, Amber would be unable to attend the recommended educational setting or placement, ECD, without provision of the requested service during the school day, the Panel concluded that receipt of the requested services was essential if she was to benefit from special education, and that the care of her neurogenic bladder was, therefore, a "related service" in her case. This Court further held that the School District's refusal to provide the requested service, which was held to be a "related service" under EAHCA, violated Section 504 of the Rehabilitation Act. The Court remanded the case to the District Court for further proceedings not inconsistent with its opinion based upon its assumed facts.

Upon remand, the Tatros stipulated the requested service was *medical treatment*, was the *treatment* of choice of most *medical* centers, that prescribing CIC or other *treatment* of a neurogenic bladder is the sole responsibility of the *treating* physician and is a *medical* function (App. p. 15 at 21 and 22). The District Court, although finding the School District could not lawfully provide the *medical treatment* to Amber without a valid doctor's prescription and other services of a licensed physician (App.33 at pps. 44, 45), ordered the Texas State Board of Education and the Irving Independent School District to modify Amber's IEP to include the provisions for the requested *medical treatment* "in accordance with and as prescribed by a valid medical prescription provided by Amber." Without finding a violation of § 504 of the Rehabilitation Act of 1973, the District Court, believing *Tatro I* was binding unless plainly undermined by the later decided *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, and remaining unconvinced as to the applicability of § 504 reinforced by *Pennhurst*, but for reasons of institutional order, awarded Appellees attorney fees pursuant to 29 U.S.C. § 794a(b). The School District duly perfected its appeal from the District Court's decision to this Court.

This Court's Panel on the subject appeal, *Tatro II*, in its Opinion of April 25, 1983, AFFIRMED the decision of the District Court. In doing so, it wrote the following:

> Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the State's educational program. Nevertheless, *Tatro I* is the authoritative interpretation of the EAHCA in this circuit, and under "law or the case" principles, must be followed by us in this subsequent appeal. . . (Panel's Opinion at p.4009)
>
> Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well-documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute. (Panel Opinion at p.4009)

At p.4015 of the Panel's Opinion, it, in addressing the § 504 claim and attorney fees, said:

> Although *Pennhurst* reinforced the district court's doubts that § 504 requires provision of CIC, the court concluded that the Supreme Court had not spoken with sufficient clarity to allow it to depart from prior decisions of this court squarely on point. 516 F.Supp. at 985. As a single panel of the court, we find ourselves similarly constrained. *Tatro I*, binding upon us to the extent that it is law of the case, clearly held that CIC is within § 504's nondiscrimination mandate.

The Panel, following "the general rule that one panel of our court does not overrule another panel", did not think *Pennhurst* went so far so as to enahle the Panel to take a view different than, or contraty to, the Panel in *Tatro I*.

ARGUMENT

In *Board of Education* v. *Rowley*, *supra*, the United States Supreme Court held a public school was not required to provide a deaf student an interpreter in the classroom in order that she receive a FAPE as provided for by EAHCA. The EAHCA requirement of a FAPE is satisfied under *Rowley* when the

State provides personalized instruction with sufficient support services to permit the handicapped child to benefit *educationally* from that instruction.

The Supreme Court in *Rowley* further defined what is meant by a FAPE under the EAHCA. "Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP." *Id.* 102 S.Ct. at 3049.

Rowley also answered the question of the role the courts play in suits brought under the EAHCA. "A court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive *educational* benefits?" *Id.* 102 S.Ct. at 3051. (Emphasis added.)

In *Pennhurst State School and Hospital* v. *Halderman, supra,* the U.S. Supreme Court held the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010 et seq., does not create in favor of the developmentally disabled any substantive rights to appropriate treatment in the least restrictive environment. *Pennhurst* held 42 U.S.C. § 6010 was enacted pursuant to the spending power of Congress and was thus in the nature of a contract in which the State voluntarily and knowingly accepts the term of the contract. *Id.* 101 S.Ct. at 1539.

> There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.

Id. 101 S.Ct. at 1539.

The Supreme Court in *Rowley, supra*, quoted *Pennhurst* at 102 S.Ct. at 3049, n.26, in construing the EAHCA as being also enacted pursuant to Congress' spending power, and said:

> As already demonstrated, the Act and its history imposes no requirements on the states like those imposed by the District Court and the Court of Appeals. A *fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

Id. 102 S.Ct. at 3050, n.26.

If the EAHCA does not require an interpreter be provided for a deaf student to benefit from special education and receive a FAPE, as *Rowley* has held, it can hardly be said the EAHCA requires the public schools to provide that *medical treatment* which may be prescribed by the student's physician for *non-educationally related* purposes. If an interpreter for a deaf student is not required, the EAHCA does not require the public schools to "secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school." Memorandum Opinion of the District Court (App.p.45), 516 F.Supp. 968, n.13 (1981).

Tatro I was a case of first impression construing EAHCA in this circuit. It necessarily was written solely on the basis of assumed facts and findings. There were no United States Supreme Court cases on which the courts could rely in construing and applying the Delphic statute and its implementing regulations. Appellant believes, therefore, *Tatro I* was written to guide the courts of this circuits in its efforts resolving cases of exceptional importance to handicapped children, their parents, and the public schools. It therefore departed from the Court's usual practice of vacating and remanding for findings of fact cases on appeal from the granting or denial of preliminary injunctions. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1975). In view of events since *Tatro I*, the reasoning behind the general rule is apparent.

Tatro I, since based on only assumed facts, should, Appellant believes, be construed as an advisory opinion "based upon

a hypothetical state of facts." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229 at 241 (1937). Such an advisory opinion creates confusion in the lower courts, as well as the panels of this Court, in seeking to determine what precedential effect should be given to its decision.

The panel in the instant appeal was obviously reluctant to follow the general rule that one panel of the court does not overrule another panel. This is more than evident when the Panel wrote at p.4009 of its Opinion:

> Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child. . .

and

> Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute.

It has been held one panel of the 5th Circuit cannot overrule a decision of a previous panel. *Fulford* v. *Klein*, 529 F.2d 377, on rehearing 550 F.2d 342. One panel of the Court of Appeals may not disregard a precedent set by a prior panel, even though it conceives error in the precedent. Only the court en banc can effect such a result. *Davis* v. *Estelle*, 529 F.2d 437.

The Court of Appeals, sitting en banc, may, however, overrule any panel decision that a majority of acting judges believes was wrongfully decided, including a decision established by a panel in an earlier appeal in the same case. *VamGemert* v. *Boeing Co.*, 590 F.2d 433, aff'd 100 S.Ct. 745. Appellant believes, and strongly urges, the issues and questions involved in this appeal are of such exceptional importance in determining the rights of the handicapped child and the obligations of the public schools that this Honorable Court should consider Appellant's Petition for Rehearing and this appeal en banc. Having the benefit of *Pennhurst* and *Rowley*, decided by the

United States Supreme Court since *Tatro I*, compels the Appellant to believe there is more than sufficient reason to believe *Tatro I* is contraty to these decisions of the United States Supreme Court, and that consideration by the full Court is essential to secure and maintain uniformity of decisions in this circuit on matters of such exceptional importance.

CONCLUSION

It seems more than apparent there are substantial differences in judicial opinion between the two panels of this circuit who have considered the complex but important issues involved in this case. The panel in the instant appeal, if it were "writing on a clean slate", would perhaps take "a different view of the EAHCA upon de novo consideration" than the *Tatro I* panel, having the benefit of the subsequent United States Supreme Court's decisions in *Pennhurst* and *Rowley*. It is of exceptional importance that handicapped children and their parents know the extent of their rights under the EAHCA and § 504 of the Rehabilitation Act. It is likewise of exceptional importance to the Irving Independent School District and other public schools of states in this circuit to know the extent of their obligations to their handicapped students, and to therefore avoid inadvertent violation of the rights of a handicapped student.

1. The Appellant therefore requests that a rehearing of the appeal in this cause be granted; and

2. That the honorable judges of this Court order that the above entitled cause be heard by the Court en banc.

Respectfully submitted,

/s/ James W. Deatherage
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Attorney for Appellant,
Irving Independent School District

CERTIFICATE

As counsel for the Irving Independent School District, Appellant, I hereby certify that the foregoing Suggestion of En Banc Consideration on Rehearing is presented in good faith and not for delay.

/s/ James W. Deatherage
JAMES W. DEATHERAGE
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Suggestion of En Banc Consideration on Rehearing of Appellant, Independent School District, has been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751; to Ms. Martha H. Allan, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; and to Mr. Tally F. Parker, Jr., 300 InterFirst Bank Building, Irving, Texas, 75061, on this the 9th day of May, 1983.

/s/ James W. Deatherage
JAMES W. DEATHERAGE

TESTIMONY OF DR. GEORGE HURT

* * * *

[261] Q. You don't want her to void, to attempt to void herself?

A. Not yet.

Q. Do you know why 2 or 3 years ago Helping Hand Development School was trying to do that after they had a prescription from you for clean intermittent catheterization?

A. I don't know why they would.

Q. You bring any of your patient records regarding Amber with you today?

A. Just a very few, one page.

Q. May I see that, please?

A. These are copies of what I have of the Scottish Rite records.

Q. You have no office patient records of Amber?

A. No. All I have are letters from lawyers. They asked me to bring anything and all I had was letters from both sides of this. Amber is not a private patient of mine. She goes to Scottish Rite Clinic and I go out there as a consultant and see her. I've gone for a long time. I don't have any residence so I see the patient year after year although it's like a private practice, see them every time that's unless my partner covers for some reason.

* * * *

[263] reach the maximum intervesicle pressure and in that instance crede up into her kidneys. As you creded her you near that pressure or more.

Q. Greater risk to her health to crede the bladder at that interval other than not catheterizating?

A. I think probably be more risk to crede than to leave her alone. Probably gets a higher pressure if you creded a full bladder rather than trying to let it dribble out.

Q. Now, if someone credes the bladder would you necessarily have to crede to the extent to completely empty the bladder or just relieve some of the pressure?

A. Any time you press on a full bladder you're going to increase the pressure, above the pressure you would obtain ordinarily, and so you're going to increase the pressure in the system if you start pressing on the bladder anyway. So I would say that you may be better leaving it alone rather than creding trying to empty, her bladder start leaking, you couldn't empty probably completely with her sphincter.

Q. How much is a greater amount of pressure then say needs to be applied to crede the bladder?

A. Sometimes on a trigger spot and put a little bit of pressure on it but most people in the field of neurogenic bladder work have stopped credeing bladders.

* * * *

[276] A. I understand that.

Q. All right. Do you supervise or control any employee or school nurse of Irving Independent School District?

A. I didn't get the question.

Q. Do you supervise or control any Irving Independent School District employee or nurse?

A. No, I don't.

Q. Have you assigned any of your employees to the Irving Independent School District to carry out any of your prescribed orders?

A. No, I don't think so.

Q. Do you direct any of the school district nurses or teachers' activities and responsibilities?

A. No.

Q. Have you delegated any tasks involving treatment or care of any patient to any nurse or other employee of the Irving Independent School District?

A. Not that I know of.

Q. Does determining abnormality of the individual involve the exercise of some medical judgment?

A. No.

* * * *

TESTIMONY OF CINDY GUY

* * * *

[318] Q. (By Mr. Deatherage) In May of 1979, at the time of the ARD Committee decision, what were the hours of the early childhood classes in the half day program?

A. The class that we felt was most appropriate for Amber at that time was from 8:30 to 11:15, 5 days a week.

THE COURT: 8:30 to 11:15?

* * * *

[320] Q. To your knowledge has Mrs. Tatro or Mr. Tatro requested any educational services for the school year of 1980-'81?

A. Not to my knowledge, no, sir.

* * * *

[321] Q. Thank you. And what was the substance, if you recall, of that conversation with Mrs. Tatro regarding somebody providing CIC?

A. It seems, to the best of my recollection, we discussed that possibility, if there could be some way that Amber could come to school, we would like to have her in, then maybe if Mr. and Mrs. Tatro could go ahead and make arrangements with someone, a neighbor, a friend, a nurse, just whatever, that if in the long run, when all the Court cases and everything ended up, if we did not, the school district did not prevail that we would reimburse them for any expenses that [322] they incurred.

* * * *

RELEVANT PLEADINGS, FINDINGS, CHARGES, OR OPINIONS

The following documents have not been reprinted in the Joint Appendix since they already appear in the Appendix of the Petition for Writ of Certiorari.

Memorandum Opinion of Judge Higginbotham, Tatro I (Filed December 21, 1979) Tatro v. Texas, 481 F.Supp. 1224 (1979) ..... Pet. App. 86a

Opinion of the Court of Appeals (5th Circuit) (J. Goldberg) Tatro I (Filed September 20, 1980) Tatro v. Texas 625 F.2d 557 (1980) ..... Pet. App. 94a

Memorandum Opinion of Judge Higginbotham (Filed May 26, 1981) Tatro v. Texas, 516 F.Supp. 968 (1981) ..... Pet. App. 1a

Judgment ..... Pet. App. 53a

Memorandum Opinion of Judge Higginbotham (Filed September 8, 1981—Unpublished) ..... Pet. App. 55a

Amended Judgment ..... Pet. App. 62a

Opinion of the Court of Appeals (5th Circuit) (J. Gee) (Filed April 25, 1983) Tatro v. Texas 703 F.2d 823 ..... Pet. App. 64a

Order (J. Gee) Denying Petition for Rehearing En Banc (Filed July 5, 1983) ..... Pet. App. 84a

JUDGMENT(S) OR OPINION(S) IN QUESTION

The following documents have not been reprinted in the Joint Appendix since they already appear in the Appendix of the Petition for Writ of Certiorari.

Opinion of the Federal District Court for the Northern District of Texas (Judge Higginbotham) (Filed May 26, 1981) Tatro v. Texas, 516 F.Supp. 968 (1981) ..... Pet. App. 1a

Memorandum Opinion of Judge Higginbotham (Filed September 8, 1981—Unpublished) ..... Pet. App. 55a

Opinion of the Court of Appeals (5th Circuit) (J. Gee) (Filed April 25, 1983) Tatro v. Texas, 703 F.2d 823 ..... Pet. App. 64a

Office Supreme Court, U.S.
FILED
NOV 7 1983
ALEXANDER L. STEVAS,

No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI and MARY TATRO, individually and as Next Friends of AMBER TATRO, a Minor,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Courts below were correct in holding that under the Education of the Handicapped Act, as amended, Amber Tatro is entitled to clean intermittent catheterization as a "related service" to enable her to attend school and thereby benefit from special education.

2. Whether the Courts below were correct in holding the Petitioner's refusal to provide catheterization services to Amber had the effect of denying her the benefits of and excluding her from participation in Petitioner's federally assisted program on the basis of her handicap, in contravention of Section 504 of the Rehabilitation Act of 1973, as amended.

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STATEMENT OF THE CASE

Amber Tatro is a female child of normal intelligence who is disabled by the birth defect of myelodysplasia, more widely known as "spina bifida," an orthopedic handicap within the meaning of 20 U.S.C.§1401(1). Among the effects of Amber's handicapping condition are speech impediments, mobility impairment and a neurogenic bladder. As a result of her bladder dysfunctoin, involving an inability to retain urine or voluntarily empty her bladder, Amber must be catheterized every three to four hours in order to avoid excessive pressure within the bladder and the attendant risk of infection. Clean intermittent catheterization ("CIC") is a simple procedure whereby a small tube is inserted approximately one inch into the urethra in order to drain the bladder of urine. Although the procedure must be prescribed by a physician, it need not actually be perfomed by a physician or nurse. With approximately thirty minutes of training, an average layperson can learn to perform CIC safely in about five minutes, and Amber herself should be able to self-catheterize when she is not much older. In Petitioner's neighbor, the Dallas Independent School District, CIC is regularly provided by school personnel to children who need it. Scottish Rite Hospital in Dallas has offered to train Petitioner's personnel, free of charge to the school district, in the administration of CIC.[1]

After Amber reached the age of three, at which time she became eligible under state and federal law for a free appropriate public education as a handicapped child, her parents Henri and Mary Tatro requested CIC as part of Amber's individual educational program (IEP). In May of 1979, the school district recommended placement of Amber in Petitioner's Early Childhood Development classes and agreed to provide the related services of physical therapy, occupational therapy and speech

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1. As to the latter two points, see the testimony of Dr. George Hart, Transcript at 241-242, 255, 283-284, 288-289.

therapy. However, Petitioner, a recipient of federal financial assistance (see App. 61a, 81a), refused to provide CIC to Amber, whereupon pursuant to their rights under 20 U.S.C. § 1415(b)(2), the Tatros presented their complaint to a due process hearing before an Impartial Hearing Officer. The Impartial Hearing Officer ruled that CIC is a related service which Irving I.S.D. is required to provide to Amber under 20 U.S.C. § 1401 *et seq.*, which ruling was adopted as the Decision of the State Commissioner of Education in *Amber T., bnf Mary T. v. Irving Independent School District*, TEA Docket No. 115-SE-579 (August 6, 1979). Although precluded by 20 U.S.C. § 1415 from reviewing the decision of the Impartial Hearing Officer (see footnote 7 below), nevertheless the State Board of Education illegally reversed the Commissioner and Impartial Hearing Officer and affirmed Petitioner's refusal to provide CIC to Amber Tatro.

Following the illegal action of the State Board of Education, Plaintiffs/Respondents filed suit in the United States District Court for the Northern District of Texas, Dallas Division, against the State of Texas, members of the State Board of Education, Irving Independent School District, and the Irving I.S.D. Superintendent and school board trustees. Plaintiffs sought an injunction ordering CIC services for Amber, as well as money damages, under, *inter alia*, the Education of the Handicapped Act, as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*; and Sec tion 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. On December 21, 1979, Hon. Patrick Higginbotham, U. S. District Judge, entered an order denying a preliminary injunction to require the Defendants to provide CIC to Amber Tatro, Petitioner's Appendix (App.) at 86a, whereupon the Tatros appealed to the Fifth Circuit.

Because counsel for Defendant/Petitioner Irving I.S.D. had refused to sign (without informing Judge Higginbotham of the refusal) the proposed stipulations solicited by the District Court and submitted by Plaintiffs, the Court of Appeals had no facts before it on appeal. App. 4a. However, the Court held as a matter of law that CIC is a valid related service, under 20 U.S.C. § 1401 *et seq.* and 29 U.S.C. § 794, which Petitioner is required

to provide to Amber Tatro, to the extent that Amber needs such in order to attend school so that she can benefit from special education. "*Tatro I*" (App. 94a.) The Court of Appeals remanded the case to the District Court to determine whether the facts of the case were as assumed by the Circuit Court, based on the proposed stipulations, and whether any other material facts not previously considered should alter the result. App. 95a-96a.

Subsequently, the parties entered into stipulations in a Pre-Trial Order and the District Court below took evidence at trial and in subsequent evidentiary hearings, on the basis of which Judge Higginbotham made findings of fact consistent with those assumed by the Court of Appeals on the prior appeal, ordered Defendants to provide CIC to Amber Tatro, and awarded limited damages and attorneys' fees to Plaintiffs. App. 1a, modified by Order and Memorandum Opinion, App. 55a, 62a. From that final order, Defendants Irving I.S.D. and the State Board of Education appealed. On April 25, 1983, the Court of Appeals rendered its second decision in the case, "*Tatro II*," holding that neither its prior decision nor the District Court's subsequent decision were clearly erroneous and affirming the District Court decision. App. 64a. After its request for rehearing *en banc* was denied, App. 84a, Appellant Irving Independent School District petitioned this Court for a Writ of Certiorari.

ARGUMENT: THE PETITION SHOULD BE DENIED

I. The Decision of the Court of Appeals is Correct and is not in Conflict with the Decision of any Federal Court.

The Education of the Handicapped Act as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, is a program of cooperative federalism designed to assist states and local school districts in providing education programs to handicapped children. A state which elects to receive money under the EHA must provide each of its school-aged handicapped children with, *inter alia*, a "free appropriate public education." 20 U.S.C. § 1412(1). Local educational agencies, such as Petitioner, have parallel obligations. 20 U.S.C. §

1414(a)(1)(C)(ii). A "free appropriate public education" is defined in pertinent part as "special education and related services." § 1401(18). Each of these terms is then further defined. Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child," §1401(16), and related services are:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a handicapped child to benefit from special education,* and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17); App. 110a (emphasis added). The District Court and the Court of Appeals below held that, for Amber, CIC is a valid related service which the Petitioner must provide to her so that she can attend school and benefit from the special education program offered there. This decision is correct and is consistent with the only other Court of Appeals decision which has dealt with the issue. *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3rd Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, ____ U.S. ____, 102 S.Ct. 3508 (1982).

The decisions of the District and Circuit Courts in *Tokarcik* and *Tatro* fit securely within the words of the statute. Catheterization is agreed to be a "supportive service," e.g., App. 103a, and all four of the lower Courts in *Tatro* and *Tokarcik* found as a fact that the service is needed by a child with Amber's handicap in order to attend class without undue risk to her health. App. 15a, 74a; *Tokarcik, supra*, at 455–459. The logic of the Third and Fifth Circuits is compelling—that "without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." *Tokarcik, supra*, at 457;

Tatro I at App. 104a. Consequently, CIC is a supportive service[2] needed to assist Amber to benefit from special education.[3]

The District Court and Court of Appeals in the instant case further held that Petitioner's denial of catheterization effectively denied Amber the benefits of and excluded her from participation in its special education program, in contravention of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended [App. 111a] (hereinafter "Section 504"). By depriving Amber of a service she needs, solely on account of her handicap, in order to participate in and benefit from Petitioner's federally assisted program, Petitioner clearly violated Amber's rights as an otherwise qualified handicapped individual under Section 504.[4] As noted by the Court of Appeals, its interpretation and application of this Court's ruling in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), is consistent with

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2. Even if, improbably, CIC were held not to be a "related service" or "supportive service" within the meaning of § 1401(17), it still would have to be considered a "supplementary aid [or] service" within the meaning of 20 U.S.C. § 1412 (5)(B), which requires that a handicapped child not be removed from the regular educational environment unless her "education in regular classes . . . cannot be achieved satisfactorily," even "with the use of supplementary aids and services." Clearly CIC is a supplementary aid or service needed to enable Amber to be educated satisfactorily (in this case, safely) in the regular educational environment. See *Tatro I* at App. 102a, 106a-107a.

3. In *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976), cited with approval by the Second Circuit in *Kampmeir v. Nyquist*, 533 F.2d 296 (2nd Cir. 1977), and by the Third Circuit in *Tokarcik, supra*, at 458, the Court, on the basis of the EHA and Section 504, enjoined the school district either from excluding the disabled girl because of the services she required due to spina bifida (undoubtedly including CIC) or from requiring that the child's parent be responsible for such services.

4. The only other decision of which Respondents are aware concerning CIC for a spina bifida child to attend school is *Sherer v. Waier*, 457 F. Supp. 1039 (W.D. Mo. 1977), in which the plaintiffs relied on Section 504. The Court dismissed the action without prejudice so that the plaintiffs could

that of other Circuits in their post-*Davis* decisions on Section 504. App, 79a, citing *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982). See also *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982) at 1201-1202 n.36; *Cook v. U.S. Dept. of Labor* 688 F.2d 669 (9th Cir. 1982); *Dopico v. Goldschmidt*, 687 F.2d 644 (2nd Cir. 1982) at 650-653.

II. The Decision of the Court of Appeals does not Warrant Review by this Court as a Matter of Significant Public Importance.

While the decisions below are of enormous significance for Amber—meaning the difference (for a girl of normal intelligence) between attending regular public school classes with other children her age, on the one hand, and exclusion from public school and segregation in a school only for the handicapped on the other hand—their impact is marginal at most for the Irving Independent School District, other state and local educational agencies, and the public at large.

In both *Tatro* and *Tokarcik*, the Courts found as facts that CIC is simple and inexpensive, is not time-consuming, and does not have to be performed by a physician. App. 10a and

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Note 4 — (*Continued*)

exhaust administrative remedies available from the Department of HEW (now Education) Office of Civil Rights (OCR), the executive agency charged with enforcing Section 504. Subsequently, OCR ruled that the child was entitled to CIC under Section 504. *North Kansas City (Mo.) School District*, 3 EDUCATION FOR THE HANDICAPPED LAW REPORTS 257:04 (November 29, 1978). Every Circuit Court to address the question has since concluded that Section 504 provides a private right of action without requiring prior exhaustion of administrative remedies. See cases cited in *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) at 131, *vac. and rem. on other grounds*, 451 U.S. 390 (1981). *Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (private right action under 20 U.S.C. § 1681 *et seq.*), and *Guardians Ass'n v. Civil Service Comm'n*, ___ U.S. ___, 102 U.S. 3221 (1983) (private right of action under 42 U.S.C. § 2000d). In the instant case, the Plaintiff/Respondent Tatros exhausted their OCR remedies and obtained a ruling (with which Petitioner refused to comply) that Amber is entitled to CIC under Section 504.

elsewhere; *Tokarcik, supra*, at 446, 457. Since spina bifida only occurs in one or two of every 1000 births and not all children with spina bifida need CIC, *Tokarcik, supra*, at 457, schools will not be called upon often to provide this service. Nevertheless, in a futile attempt to elevate the instant case to a matter of great public significance, Petitioner suggests that the Court of Appeals decision might "require that any medical treatment prescribed by an attending physician [must] be performed and paid for by the education agency if a general health hazard might result otherwise," and could necessitate the "creat[ion of] 'national health care' through the public school system . . ." Petition for Writ of Certiorari at 6. The decision, of course, does no such thing. Relying on the plain words of the statute and regulations, the Court of Appeals has carefully circumscribed the scope of related services so that it cannot conceivably encompass "*all* medical treatment." For any "life support service" to be a related service mandated by the EHA, it *first* must be provided to a recipient who is handicapped and in need of special education within the meaning of the Act; *second*, it must be needed to assist the handicapped child to benefit from the special education to be provided (so that a life support service would not be a required related service if not needed during "school hours"); and *third*, it must be a service which a non-physician can perform.[5] App. 68a-69a, 104a-105a. Similarly, the Court of Appeals in *Tokarcik, supra*, found that "the regulations themselves place realistic limitations on the nature of the school services to be provided under the EAHCA," so that "the drastic medical services . . . which the school authorities fear they will be asked to furnish in the future are by definition excluded." *Id.* at 456.

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5. Petitioner asserts that it "understands that medical treatment such as kidney dialysis is delegated to and performed by technicians and nurses." Petition at 9. Thus, argues Petitioner, the lower decision "would transform this obvious medical treatment into a related service because it can be prescribed and delegated by a physician." *Id.* Of course, Petitioner's "understanding" is not in evidence in this case, although Petitioner had three opportunities (before the Impartial Hearing Officer and twice before the District Court) to introduce evidence on the point. Respondent "understands" that kidney

Petitioner uses the adjective "medical" misleadingly in an attempt to take advantage of the EHA's exclusion of strictly "medical" procedures (other than medical diagnosis and evaluation) from the ambit of "related services." However, a number of services which could be considered "medical" in other contexts (e.g., for insurance purposes) nevertheless are included within the meaning of "related services" and thus are not treated as "medical" under the EHA. It is not uncommon in law for a term to have a broad meaning in general usage but to have a more restricted application in a particular statute. Thus, the EHA includes as related services "physical therapy" and "audiology," which in most states must be prescribed by physicians and which are provided by personnel usually regarded as medical or paramedical. 20 U.S.C. §1401(17); App. 110a. Consequently, the implementing Department of Education regulations confine the term "medical services" to those services which can only be performed by a physician (as opposed to those which are merely prescribed and delegated by a physician).[6] 34 C.F.R. § 300 13(b)(4)

Note 5 — *(Continued)*

dialysis usually can be performed outside of "school hours" and thus would not meet the Fifth Circuit criteria. What other physician-prescribed "life support" services might have to be provided to a given child by a school district under the EHA should be examined in the context of each particular case presented , keeping in mind the three limiting factors set out by the Court below: (1) is the child in question handicapped and in need of special education? (2) is the service needed to assist the child to benefit from the special education to be provided? and (3) can the service be provided by someone other than a physician?

6. If the decision of the Court of Appeals below truly opened the floodgates to a public-school-administered national health system as imagined by Petitioner, the State of Texas, the State Board of Education and the Texas Education Agency, responsible under federal and state law for supervising and significantly funding local district compliance with the EHA, would be no less adversely affected than Petitioner. Note that although the State Board of Education agreed with Petitioner's position in 1979, the State Defendants did not argue against CIC as a related service at trial or on appeal and have not joined Petitioner in seeking this Court's review of the Court of Appeals decision.

Finally, since it has been found that children such as Amber eventually can learn to self-catheterize—App. 10a; *Tokarcik, supra*, at 458-459—this case may well be moot by the time this Court could reach a decision.

III. The Decision of the Court of Appeals is not in Conflict with any Decision of this Court.

The decision of the Court of Appeals below is consistent with this Court's interpretation of the EHA in *Board of Education v. Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982). In that decision, this Court concluded that the purpose and intent of the EHA is first "to make public education available to handicapped children" and next "to make such access [to public education] meaningful." *Id.* at 3037. Consequently:

> The statutory definition of "free appropriate public education," in addition to requiring that the State provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a child *to benefit* from special education." §1401 (17) (emphasis added).

Id. at 3048. As noted in Part I above, the Courts below (as well as those in *Tokarcik*) have found as a fact that the supportive service of CIC is required to assist Amber to benefit from special education because without it she cannot attend class to receive the specially designed instruction. Thus, the denial of CIC presents Amber with two choices, either of which is offensive to the EHA as illuminated in *Rowley*: (1) to be deprived of access to public education, or (2) to be provided access which is not meaningful. Attending class at risk to her health (and possibly her life) can hardly be considered "meaningful" or "beneficial."

If the approach of the Court of Appeals below to related services under the EHA were incorrect under *Rowley*, the logical opportunity for this Court to signal such was presented by the petition for *certiori* in *Scanlon v. Tokarcik, supra*, denial of

which immediately followed *Rowley* and preceded (and thus could have prevented error in) *Tatro II*. In *Springdale School District v. Grace*, ____ U.S. ____, 102 S.Ct.3504 (1982), two days after the *Rowley* decision, this Court remanded the case for reconsideration in light of *Rowley*. Obviously, then, in the immediate aftermath of *Rowley*, this Court scrutinized EHA decisions on petition for *certiorari* for their consistency with *Rowley*. However, in the case of *Tokarcik*, in which the Third Circuit's treatment of CIC as a related service was indistinguishable from (and relied upon) that of the Fifth Circuit in *Tatro I*, this Court simply denied *certiorari*, without remanding for reconsideration in view of *Rowley*.

This Court in *Rowley* indicated that great weight and deference should be given to the decision of the Impartial Hearing Officer. *Id.* at 3051. *Accord*: "I believe that the District Court and Court of Appeals should have given greater deference than they did to the findings of the . . . impartial hearing officer and the State's Commissioner of Education . . ." *Id.* at 3053 (Blackmun, J., concurring). In the instant case, the District Court and Court of Appeals have reached the same result as the Impartial Hearing Officer and the State Commissioner of Education.[7] App. 3a, 66a.

The Court of Appeals decision below is not in conflict with *Southeastern Community College v. Davis, supra*. The latter decision concerned the application of Section 504 in the context of an institution of *higher* education. However, this Court has consistently recognized a critical distinction between public postsecondary educational institutions on the one hand and public pre-school, elementary and secondary schools on the other. *Martinez v. Bynum*, ____ U.S. ____, 103 S.Ct. 1838

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7. The decision of the Hearing Officer, adopted by the Commissioner, was reversed by the State Board of Education. However, as noted by the Court of Appeals below, the State Board had no authority under 20 U.S.C. § 1415 "to review the decisions of an independent hearing officer." App. 83a n. 10, citing *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981) at 805-806 & n. 9, *cert. denied* 455 U.S. 946 (1982). Consequently, the State Board decision in Petitioner's favor is not entitled to the weight and deference contemplated by *Rowley, supra*.

(1983) at 51 U.S.L.W. 4527; *Tilton v. Richardson*, 403 U.S. 672 (1971) at 685-686; *Brown v. Board of Education*, 347 U.S. 413 (1954) at 494. Accordingly, a public school district legally may be compelled to take more steps and incur heavier burdens, in order to prevent the denial of its benefits to a handicapped student, than could be imposed on an institution of higher learning. See also *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981) at 350, *cert. denied*, ____ U.S. ____, 102 S.Ct. 566 (1981). Further, as noted by the Court of Appeals below, Respondent Amber Tatro, unlike the plaintiff/respondent Francis Davis, is capable of benefiting from the program offered, if given reasonable accommodations to permit her access to it. App. 80a, 108a.

The Court of Appeals decision below is not inconsistent with *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). That decision held that when Congress seeks to impose requirements on the states in a funding statute pursuant to its spending power, it must do so in such a manner as to give a state fair notice of what is expected of it, so that the state can make an informed decision as to whether to participate in the funding program and be bound by the act's obligations. By listing such things as physical therapy, audiology, psychological services, etc. in § 1401(17), Congress gave fair notice to the states that the EHA would require school districts to provide services not traditionally offered in the public schools.[8] By emphasizing "individualized" services to meet each child's "unique needs," § 1401(16)-(19), Congress indicated that the list of services in subsection (17) was not (indeed, could not be) exhaustive—a point made explicit in the 1977 implementing regulations. 34 C.F.R. § 300.13 *Comment; Tokarcik, supra*, at 457. By including, as examples, such services as physical therapy

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8. Note that prior to the enactment of §16.104 of the Texas Education Code, to "ensure state compliance with requirements for supplemental federal funding for . . . the delivery of instructional or related services to handicapped students," *Id.* at (a) (1), Texas law made no provision at all for related services to handicapped students, except for special transportation. Compare § 16.104 (Vernon Supp. 1983) with its predecessor § 16.16 (Vernon 1972).

and audiology, Congress clearly revealed that related services could include services which must be prescribed by a physician and performed by paramedical personnel. By including transportation in the illustrative list, Congress made the states aware that related services could include services needed by the child in order to be present at school. Finally, § 1412(5)(B) leaves no doubt that a state is responsible for supplementary aids and services needed to enable a child to be educated in the regular school environment. Consequently, the EHA gave fair notice to Texas that a child such as Amber would be entitled to a physician-prescribed supportive service which, though not specified by name in the Act, is needed to enable her to attend public school and participate without undue risk to her health in the regular educational environment.

CONCLUSION

In view of all the foregoing, it is clear that the criteria for granting a Writ of Certiorari have not been met. Accordingly, the Petition should be denied.

Respectfully submitted,

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No. 83-558

IN THE

Supreme Court of the United States

October Term, 1983

Irving Independent School District

Petitioner

v.

Henri and Mary Tatro, Individually and
Next Friend of Amber Tatro, A Minor

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MOTION TO APPEAR AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE
NATIONAL SCHOOL BOARDS ASSOCIATION
TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari. Counsel for Petitioner has consented to the appearance. A copy of the letter of consent is attached. Counsel for Respondents has not consented.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

NSBA represents districts of different sizes and geographic locations, all of which are affected by the decision below.

some to a much greater degree than even Petitioner. These school districts are spending over $7 billion for special education above the costs of regular education. Rand Corporation Study for U.S. Department of Education The Cost of Special Education. But education is the business of these school districts and they recognize and accept their duty to provide an equal opportunity to handicapped children to receive a quality education. However, this case involves more than equal educational opportunity. It puts school districts across the land in the business of providing medical services to children. School districts haven't the financial or staff resources to provide these services. NSBA, on behalf of these districts, respectfully urges this Court to allow it to state its views on the Petition for Writ of Certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts, governed by locally elected or appointed school boards, receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

REASONS FOR GRANTING THE WRIT

I. The decision below creates a conflict in the circuits on the question of whether plaintiffs can recover attorneys' fees under § 505 of the Rehabilitation Act of 1973 in an action falling within the parameters of the EAHCA.

II. The decision below fails to follow the precedent set by the United States Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); and Board of Education of Hendrick Hudson Central School District v. Rowley,

___ U.S. ___, 102 S. Ct. 3034 (1982).

III. The Fifth Circuit's interpretation of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. and § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794 exceeds the intent of Congress in enacting these measures and constitutes a severe encroachment of the judiciary into local policy-making.

IV. The decision below was designed for a large urban school district, but must be applied to school districts across the country, including small rural districts.

ARGUMENT

I. The decision below creates a conflict in the circuits on the question of attorneys' fees awards.

The First Circuit Court of Appeals ruled in Smith v. Cumberland School Commit-

tee, 703 F.2d 4, 9-10 (1st Cir. 1983), that "even if there is generally a private right of action under § 504 of the Rehabilitation Act of 1973, we hold that attorneys' fees are unavailable here under the accompanying fees provision. 29 U.S.C. § 794a(b)... While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude 'overlapping' action under § 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act ...."

The court below, after finding a violation of EAHCA, went to the § 504 issue, stating: "The EAHCA does not provide for attorneys' fees awards. The district court awarded attorneys' fees to the Tatros under § 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(b) which authorizes such awards to prevailing parties in actions to enforce provisions of the Reha-

bilitation Act." Appendix to Petition for Certiorari at page 77a. The court, after discussing Pennhurst and other cases, concluded that § 504 applied and affirmed the award of attorneys fees. Thus, there is a conflict in the circuits on the question of attorneys fees under § 504, where a violation of EAHCA also exists, which should be resolved by this Court.

II. The decision below fails to follow the precedents set by the United States Supreme Court.

Southeastern Community College v. Davis

The decision below is based on interpretations of two statutes. One of those, § 504 of the Rehabilitation Act of 1973, prohibits discrimination against qualified handicapped children in federally assisted programs and activities. The Supreme Court interpreted that statute in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

This Court, in discussing HEW regula-

tions under § 504, made the observation that: "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by the statute." Id. at 410.

The court below found a violation of § 504 because Amber Tatro will allegedly be "excluded from the school district's program [because, as a result of the] district's refusal to provide Clean Intermittent Catheterization (CIC) to Amber, she will be unable to participate in the preschool programs of the school district." Appendix to Petition for Certiorari, page 108a. That reasoning begs the question. The school district is not refusing to educate Amber, it is merely refusing to provide a medical service to her in the same

manner as it would refuse to provide medical services to non-handicapped children. The lower court is requiring the districts to "make substantial adjustments to its existing program beyond those necessary to eliminate discrimination."

Pennhurst State School and Hospital v. Halderman

The second statute interpreted by the court below is the Education for All Handicapped Children Act (EAHCA). This statute was passed by Congress pursuant to its spending powers. Its primary objective is to fund elementary and secondary school programs for handicapped children. In order to qualify for the funds, school districts must meet certain requirements, including the development of an individualized education program (IEP), and the development of due process procedures, as set out in the statute.

In Pennhurst, 451 U.S. 1 (1981), this Court, in construing another funding stat-

ute designed to assist states to create programs for the disabled, held: "Legislation enacted pursuant to spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so unambiguously."

The court below attempts to distinguish Pennhurst on the ground that the EAHCA specifically states that school districts must provide "special education and related services" and the "issue in the present case is the scope of those rights." That is true, but it too begs the question. The Supreme Court's decision in Board of Education of Hendrick Hudson v. Rowley, ___ U.S. ___, 102 S. Ct. 3034 (1982), also involved the scope of the right to a "free

appropriate education" yet this Court cited Pennhurst in support of its decision in that case.

The condition in the contract between school districts and the federal government calls for the provision of related services in the context of the provision of "special education." If the Congress indeed intended to include this type of medical service, which is completely outside the scope of the usual business of schools, it should have done so unambiguously.

Board of Education of Hendrick Hudson Central School District v. Rowley

The leading case under the EAHCA is, of course, the Supreme Court decision in Rowley. Rowley holds that the EAHCA provides a "'basic floor of opportunity' consisting of personalized instruction and related services designed to enable handicapped children to benefit from education." Appendix to Petition for Certiorari page

75a. Rowley did not concern the scope of the term "related services." Rather, the issue in the case related to the question of whether a court could impose its own view of a preferred methodology. The Supreme Court answered that question in the negative, holding that the courts' only inquiries should be 1) whether due process procedures are followed and 2) whether the program adopted by the district is designed to assure that the child receives a meaningful education.

There is no contention by Respondents that the school district is failing to provide a "meaningful" education to Amber Tatro. Their only complaint is with the district's refusal to provide CIC, which has no relationship to her education. The issue in this case is not whether Amber Tatro requires a service because of some diagnosed problem, but whether that service is educationally necessary -- in other words, does the provision of the service in issue

make a meaningful impact on educational progress? If it does not, it is not required under Rowley.

III. The lower court has gone beyond the intent of Congress in passing the EAHCA.

Congress expressly stated in its definition of "related services" in the EAHCA that the term does not include "medical services" except to the extent required for "diagnostic and evaluation purposes only." How, then, does the lower court reach the conclusion that CIC is required? By the tortured reasoning that because the Texas Medical Society states that the procedure can be performed by a lay person, when prescribed by a licensed physician, the performance of CIC is suddenly transformed into a non-medical service.

We direct this Court's attention to the description in the lower court opinion of the CIC procedure, Appendix to Petition for Certiorari at pages 73a-73b. One look should lead this Court to take judicial no-

tice of the fact that CIC is a "medical service." The clear implication of the statute is that medical services should be provided only for a specific limited purpose, i.e., diagnosis and evaluation, not for an ongoing or continuous medical need. Since Respondents do not claim that the CIC is for "diagnostic and evaluation purposes" it is excluded from the coverage of the statute.

IV. The decision below was designed for a large suburban district, but will affect all districts, regardless of size and resources.

In the fall of 1982, the Department of Education published for comment a Notice of Proposed Rulemaking under the EAHCA. 47 Fed. Reg. 33836. Section 300.4(b)(10) of that notice (attached at Appendix A) suggested that the provision of related services be limited to non-medical services as designated by state law. In response to that notice, NSBA surveyed its member school districts in order to provide the

Department with a clear picture of the problems school districts are having with the regulations as they presently stand.

School districts in 19 states, with student populations ranging from nearly one million to less than 700, provided responses to NSBA. One main theme soon became apparent in their comments -- nearly all districts expressed their dismay that, given their limited educational budgets, they are being required to take on responsibilities better placed with other social agencies. As one survey respondent stated, "Schools in [this state] have become, by default, the major social agency serving the health, psychological, respite and custodial care needs of children."

Should the school districts be forced to take on these multiple roles? The answer is a most definite no. It is impossible for one body to be all things to all people. In trying to solve one portion of a problem, it is important not to overlook

the needs and constraints of the whole. Judicially formulated requirements pertaining to related services are one of the most difficult, if not the single most difficult, expenditure to justify to those who are complaining about the dwindling funds available for the education of all public school children.

Alternately, should it be found necessary for the schools to take on these many tasks, the decision is one best made by the state, not the judiciary. Only the state and local governments are fully aware of the myriad considerations that go into allocating scarce fiscal resources. Judicial tampering with this allocation of responsibility and resources will only serve to upset the careful balance that states have reached, and ultimately, do more harm than good to those it is attempting to help. A study by the Rand Corporation for the Department of Education concluded that "all states are experiencing difficulties in

trying to provide related services to handicapped youth." A major part of the problem noted is definitional uncertainty, with school districts providing what they consider to be medical services to students because of court imposed mandates.

Though the Irving School District is a moderately large district with about 22,000 students, and might be able to muster the necessary resources to undertake the lower court's mandate, it must be noted that it is not a "typical" school district. 87% of the 16,000 school districts in this country have less than 5,000 students, and 25% have less than 300 students. These school districts are also falling under the mandate of the circuit courts that have ruled that CIC and other non-educational services must be provided to students within their bounds.

These smaller districts, which lack the specialized staff to perform such tasks, will incur even higher costs than those faced by Petitioner. When one considers

the full range of medical services that schools, if the decision below is taken to its logical conclusions, may soon be forced to provide, the costs begin to multiply rapidly. Under the lower court decision, schools would be obligated to provide insulin injections, dialysis, maintain tracheostomies and perform other life-sustaining medical services. In fact, courts are requiring such services at the present time. To provide these services, other programs -- educational programs -- will have to be sacrificed, and the original intent of the Act, to provide an education for handicapped children, will ultimately suffer.

It is not just the direct costs of providing the related services, but also the indirect burdens that attend them that concern school districts. School boards today are wide open to tort liability claims. With insurance costs already sky high, districts will now be faced with adding an additional risk -- medical services -- to the

policies which try to protect them. Many may find in the long term that it is more expedient to hire medical personnel - thus stretching tight budgets even further -- rather than face this potential liability.

Additionally, unions across the country are already beginning efforts to have handicapped children "triple-counted" for purposes of determining class size, because of the extra time and effort these children need. Faced with the prospect of having to provide medical services, they may seek to raise this figure even higher, if indeed, their contracts will even let them perform medical services, a question yet to be answered.

Such fears are not groundless. In at least one case, it was noted that school personnel had filed grievances charging "violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duties." See Hawaii Department

of Education v. Dorr, 531 F. Supp. 517 (D. Hawaii 1982). These concerns do not reflect cold hearted callousness on the part of school districts and their employees, but rather legitimate fears --"fear that they could not perform the medical procedure correctly ... fear of the personal aspects of the procedure ... and fear of being sued if something untoward occurred during the procedure." Id.

CONCLUSION

The First and Fifth Circuits are in complete opposition on the question of the right to attorneys' fees in a case involving both § 504 and EAHCA. That conflict should be resolved by this Court.

Despite growing fiscal constraints and federal budget cutbacks, school districts today are spending at least twice as much educating their handicapped students as they do educating their non-handicapped students. This is not to say that the dis-

tricts begrudge handicapped children the extra effort needed to help them benefit from their education. Rather, what the districts do take issue with is the provision of costly non-educational services currently being mandated by the judicial system. Though the services may be necessary to the child's physical well being, it should not be the school districts -- which can ill afford it - that should have to provide for every need of the handicapped child, no matter how tenuously related to the effort to educate.

The financial impact of this decision on school districts across the country is potentially enormous, particulary because the lower court, by finding a violation of § 504, as well as the EACHA, includes within the protection of its mandate handicapped children who would otherwise require no special education or other services of the school district. In addition, this case is directly contrary to this Court's

admonition to the lower courts to keep to their mission of interpreting the laws, not making them.

This case also provides an opportunity for this Court to provide badly needed guidance to lower courts as to the meaning of Southeastern Community College as it relates to school districts. Just how far must school districts go in taking affirmative efforts to ease the burdens that nature has imposed on handicapped children?

Respectfully submitted,

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APPENDIX A

§ 300.4(b)(10)

(10) "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, early identification and assessment of handicapping conditions in children, recreation, and counseling services.

The term does not include medical services (services relating to the practice of medicine) except for those that are for diagnostic or evaluation purposes. A public agency is not required to provide such services as--

(A) Life-sustaining procedures that -

(1) Can be provided outside the normal school day;

(2) Must be performed under sterile conditions;

(3) Must be administered by specially-trained, licensed health care professionals; or

(4) Entail a significant risk of illness or more than minimal injury to the child;

(B) Surgical procedures;

(C) Medication or the administration of medication by licensed health care professionals;

(D) Individually prescribed devices (such as eye-glasses, orthopedic equipment, and hearing aids), except that the public agency may, at its discretion, use funds under this part to provide these devices for use by a handicapped child while the child is in schools.

(ii) In determining whether a service is required to assist a handicapped child to benefit from special education, in developing the child's individualized educational program, a public agency is not precluded from establishing reasonable limitations relating to--

(A) The level, frequency, location, and duration of the services required;

(B) The qualifications of the providers of those services, where services are available from more than one qualified provider; and

(C) Services required in light of educational placement appropriate for the child under Sections 300.160 and 300.161.

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No. 83-558

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
PETITIONER,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND
AS NEXT FRIEND OF AMBER TATRO, A MINOR,
RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals' standard for providing related services conflicts with the standard established by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____ U.S. ____, 102 S.Ct. 3034 (1982).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Irving Independent School District, its board of trustees, and its superintendent have petitioned for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals reported at 703 F.2d 823. To seek clarification of the law affecting the school districts it represents, the Texas Association of

School Boards Legal Assistance Fund, by and through its attorney of record, Susan F. Heiligenthal, hereby registers its support for grant of the petition for writ of certiorari in order to have the judgment of the court below reviewed.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards, a nonprofit organization, has a membership consisting of more than 1,000 school districts in the State of Texas. Its member schools educate over 99% of the student population of elementary and secondary schools in Texas. In an effort to represent and assist local school boards, the Association seeks to express the concerns of its membership, particularly in a case that so significantly affects every school district in the state.

ARGUMENT FOR GRANT OF THE WRIT OF CERTIORARI

The need for "related services" and their role in providing a free appropriate education under the Education of All Handicapped Children Act (EAHCA) has spawned a great deal of litigation since the passage of the law in 1976. This statute guarantees that handicapped children will receive special education and "related services" to meet their unique needs, including classroom instruction, physical education instruction, home instruction, or instruction in hospitals and institutions. 20 U.S.C. §1401(16). "Related services" are defined as, "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and

counseling services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . ." Id. §1401(17). Related services must be a part of the handicapped child's individualized educational plan (IEP) to the extent that they are needed for the child to benefit from special education. If no special education is required, no related services may be provided.

The standard for interpreting when a related service becomes necessary is the cause for the proliferation of litigation in this area. Among the most important and far-reaching interpretations of the role of related services were those made by the Fifth Circuit, which concluded in this case that clean intermittent catheterization

(CIC) is a related service. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (hereinafter cited as Tatro I). These interpretations not only portend financially onerous consequences for taxpayers and increased confusion on how to treat medical and health services in deciding on student placements, but they also far exceed the guidelines later established by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ____U.S. ____, 102 S.Ct. 3034 (1982).

In its second consideration of Tatro, which occurred after the Rowley opinion was issued, the Fifth Circuit held that it must follow its previous interpretations of the EAHCA under "law of the case" principles "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling

authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," Tatro v. Texas, 703 F.2d 823, 826 (5th Cir. 1983)(hereinafter cited as Tatro II)(citing White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967)(footnote omitted; enumeration added). The Tatro II panel concluded that none of these considerations applied.

But this Court had indeed "made a contrary decision of the law applicable to such issues." Id. This Court examined whether the related service was necessary "to permit the child to benefit educationally from the [personalized] instruction." 102 S.Ct. at 3042. It did not base this standard on attendance, at any cost, in regular classes. By contrast, the Tatro I panel

went beyond this standard in determining whether the related service was necessary not only for the student to benefit from special education, but also to be able to attend regular classes.

In the first district court opinion, Judge Higgenbotham had correctly recognized that CIC should be required under the statute only if necessary for the student to fully benefit from special education. 481 F.Supp. 1224, 1227 (N.D.Tex. 1979). This ruling, very similar to the one in Rowley, was reversed by the Tatro I Fifth Circuit court. The Tatro I panel found, at variance with the Rowley standard, that since CIC was necessary for the student to attend regular classes, it must be provided regardless of whether or not a free appropriate education could be otherwise provided. In this case, the

life support service had to be provided during school hours if the child was to attend regular classes. This expanded interpretation by the Tatro I panel is crucial since, logically extended, it could require some classrooms to be equipped with hospital beds and medical monitoring devices at public expense in order to provide similar life support services during school hours for children attending regular classes. See 625 F.2d at 563. Obviously, either the Rowley standard needs to be followed or the question of how life support services are excepted from that standard must be answered. Only this Court can provide guidance in this area.

Since Rowley had been decided after Tatro I and the second district court ruling, Tatro v. Texas, 516 F.Supp. 968 (N.D.Tex. 1981), the petitioners argued

to the Tatro II court that if the student could benefit from special education at home or in another institution providing CIC, their obligation to provide a free, appropriate education under EAHCA would be met. 703 F.2d at 829. The Tatro II panel erred in holding that the petitioners were estopped from such a claim, since it was raised for the first time after the Rowley ruling and no attempt had been made to modify the IEP accordingly. That panel should have remanded the case to federal district court for its first review using the new Rowley standard. Unless this Court takes action to hear the case and correct the discrepancies between its own standard and that of the Fifth Circuit, the question of when life support services must be provided at public

expense will continue to be litigated.

The original 1979 IEP for the student in this case apparently had not anticipated the Rowley interpretation of "related services," and had not considered alternative placement options that could have provided Amber Tatro with the needed special education services, without special arrangements for CIC. The many stipulations of fact that have been made during the course of this litigation were, for the most part, made in determining issues not relevant to the application of the Rowley standard. The Tatro II court, as an appellate court, is not in the position to receive the additional evidence from both parties that may be necessary to determine an appropriate placement if it is determined that the 1979 IEP is inappropriate. The mere addition of CIC services will not necessarily cure defects in that plan,

and all of the placement considerations should be reexamined in the wake of Rowley.

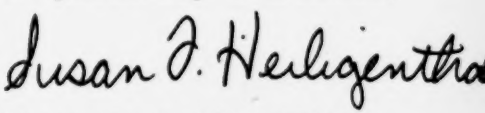
Conclusion

The decision of the court below, constrained by the Tatro I interpretations of the EAHCA issued prior to and in conflict with this Court's interpretation of the law in Rowley, creates an untenuous situation where the definition of related services has been greatly expanded. Rather than prescribe a double standard in defining "related services," this Court's interpretation should be followed, and the Court should remand the case to federal district court for proper application of that standard. If this Court's interpretation is not adopted by the Fifth Circuit, existing case law absolving schools of financial responsibil-

ity for custodial and medical services will no longer be followed. McKenzie v. Jefferson, 565 F.Supp. 404 (D.D.C. 1983). The financial implications of leaving the Fifth Circuit's ruling undisturbed are enormous.

To avoid these implications and unnecessary litigation to reconcile the two opinions, the school districts of Texas, through the Texas Association of School Boards Legal Assistance Fund, request that this Court grant the petition for writ of certiorari.

Respectfully submitted,



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November, 1983

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae in support of Petitioners' Petition for Writ of Certiorari have been served upon all parties by placing same in the United States Mail addressed to:

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November, 1983

83-558

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IN THE

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OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
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v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF FOR PETITIONER

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Petition For Certiorari Filed October 3, 1983
Certiorari Granted December 5, 1983

QUESTIONS PRESENTED

1. Whether "medical treatment" such as clean intermittent catheterization is a "related service" required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor Respondent.

2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in *Southeastern Community College* v. *Davis*, *Pennhurst State School & Hospital* v. *Halderman*, and *State Board of Education* v. *Rowley*.

TABLE OF PARTIES BELOW

This Petition is submitted on behalf of the Irving Independent School District and its Board of Trustees. The parties below are as follows:

HENRI AND MARY TATRO, Individually and as Next Friend of Amber Tatro, a Minor,
Plaintiffs-Appellees
Cross-Appellants

THE STATE OF TEXAS, TEXAS EDUCATION AGENCY,
Defendants

STATE BOARD OF EDUCATION AND ITS MEMBERS: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William P. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; ALTON BOWEN, COMMISSIONER OF EDUCATION,
Defendants-Appellants

THE IRVING INDEPENDENT SCHOOL DISTRICT, ITS BOARD OF TRUSTEES: Roger Hill, Robert Pierce (no longer on Board), Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes; James W. Fillbeck has now replaced Robert Pierce on the Board,
Defendants-Appellants
Cross-Appellees

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 823. The opinion of the Federal District Court for the Northern District of Texas is reported at 516 F.Supp. 968. These opinions and the judgment of the District Court are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 64a to 83a and pages 1a to 53a, respectively. The memorandum opinion of Judge Higginbotham (unpublished) and the amended judgment of the Federal District Court are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 55a to 61a and pages 62a to 63a, respectively. The opinion below is the second opinion in this case. The first opinion of the Court of Appeals

(hereafter "Tatro I") is reported at 625 F.2d 557 (1980). The opinion of the Federal District Court for the Northern District of Texas in *Tatro I* is reported at 481 F.Supp. 1224 (1979). These opinions are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 94a to 109a and pages 86a to 93a, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 25, 1983. A timely Motion for Rehearing and Suggestion for Rehearing En Banc was denied on July 5, 1983. The Petition for Writ of Certiorari was filed on October 3, 1983, and was granted by the Court on December 5, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are as follows:

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (1976):

Section 1401—Definitions

Section 1415—Procedural Safeguards

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.:

Sections 794-794a

State Statutes:

Article 4495(b) § 3.06(d)(1)

Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982-83)

The pertinent text of the above statutes is set forth in the Appendix to the Petition for Writ of Certiorari and appears at pages 110a to 113a.

STATEMENT OF THE CASE

In May of 1979, Amber Tatro was 3½ years old. She was presented by her mother to the Irving Independent School District for educational evaluation and assessment as a handicapped student with the request she be placed in the Irving Independent School District's early childhood development class. The School District's early childhood development program is for developing skills necessary to be able to learn when the child enters school; and to be eligible for the program, the child must be educationally handicapped and eligible for special education. (R. Vol. 4 p. 318) (Pl. Ex. 5a, b, c [testimony of Dr. Bates]; R. Vol. 3 p. 137)

Amber was evaluated and assessed by the School District, the results of which indicated she was eligible for special education because of an orthopedic handicapping condition with some speech impairment. (J.A. 8a) The School District's Admission, Review, and Dismissal Committee ("ARD"), with the participation of Amber's parent(s), developed for Amber an Individual Education Plan ("IEP"). (J.A. 8a) The IEP developed by the ARD Committee included occupational therapy and physical therapy at least twice a week and speech therapy as needed to improve gross and fine motor skills and language skills, respectively. (J.A. 8a) The ARD Committee agreed with Amber's parents that the *most* appropriate placement for Amber was in the District's early childhood development class from 8:30 o'clock, a.m., to 11:15 o'clock, a.m., each school day. (J.A. 61a)

Amber had been diagnosed by her treating physician as having a neurogenic bladder secondary to myelodysplasia, commonly called "spina bifida." A "neurogenic bladder" is a term which refers to a state of damage of the nerves ennervating the bladder which results in a dysfunction of the urinary bladder. Myelodysplasia is a

failure of the normal fetal development of one or more segments of the bony spine and underlying nervous tissue which can result in such problems as hydrocephalus (excessive water pressure on or in the brain tissue) and spina bifida (defects in the posterior portions of the spinal vertebra) with or without associated myelomeningocoela (herneation of the spinal cord and/or nerves through the spina bifida defect with resulting nerve damage). (J.A. 8a) (R. Vol. 3 p. 234)

Amber's bladder dysfunction, a direct and proximate result of her neurogenic bladder, involves an inability to retain urine with resulting symptoms of constant dribbling or intermittent involuntary emptying of the urinary bladder, and an inability to properly empty the bladder producing excessive pressure within the bladder and, subsequently, into the ureters and kidney-collection system. The latter situation generally results, and does with Amber, in symptoms of "overflow" dribbling. These symptoms result in a medical or health hazard of back-pressure effect in the bladder and the recurring or chronic infection of the urinary tract. (J.A. 8a) (R. Vol. 3 p. 234)

Amber's parents insisted the District's ARD Committee provide Amber with "clean intermittent catheterization" ("CIC") for care of Amber's neurogenic bladder because it was recommended by Amber's treating physician. The District's ARD Committee, believing the requested medical treatment procedure of CIC was not required by the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq. ("EAHCA"), nor authorized under the laws of the State of Texas, declined to modify Amber's IEP so as to include provisions for administering CIC. (J.A. 7a, 8a, 12a)

Amber's parents disagreed with the decision on the ground that CIC is the medically-accepted treatment of

choice for Amber's neurogenic bladder condition; that it does not have to be personally administered by a licensed physician; that it was necessary for Amber to benefit from special education; and that it was, therefore, a "related service" required to be provided Amber by the School District pursuant to 20 U.S.C. § 1401(17). They appealed the Committee's determination to the State Educational Agency pursuant to 20 U.S.C. § 1415(b)(2), and the state's provisions for hearings and appeals concerning the provisions for a free appropriate public education of handicapped students, because Amber's IEP did not include CIC as a "related service."

Testimony was taken at the hearing from witnesses for the Tatros and for the School District.[1] At the conclusion of the administrative proceedings, the State Board of Education found:

(1) "Amber T. to be orthopedically handicapped, and this entitled her to special education as defined in applicable statutes, guidelines, and regulations."

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[1] The Tatros were represented by counsel throughout the administrative proceedings and by a parent advocate before the ARD Committee. Amber's treating doctor testified at length in the administrative hearing, the substance of which was to the effect CIC was developed in recent years as an alternative to urinary diversion surgery and/or artificial sphincter implantation; that CIC is considered medical treatment of a disease state; that it was the treatment of choice; and that it was not, in any way, related to the care or treatment of her orthopedic handicap. He further testified Amber would have an increased risk to her health without CIC at 3 to 4 hour intervals; that CIC involved risk of septicemia, hemorrage, perforation of the bladder and/or urethra, and infection of the urinary tract. He substantially agreed with the document entered in evidence and entitled "Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia." (J.A. 9a, 11a, 12a) (Dft. Ex. 7; R. Vol. 3 p. 393)

(2) "That CIC is medical treatment for a condition resulting from a neurological disorder, and is not connected with or related to Amber T.'s handicapping condition which qualifies her for special education. There is no evidence the neurological disorder adversely affects the educational performance of the Petitioner . . . We, therefore, find CIC is not a service consisting of *specially designed instruction* to meet the educational needs of the Petitioner and thus is not special education . . ." (emphasis added)

(3) "Based on the testimony of Dr. George Hurt and Dr. Richard Bates and the document entitled 'Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia,' we find CIC is not a developmental, corrective, or supportive service required to assist the Petitioner to benefit from special education designed to meet the educational needs of her orthopedic handicap; we, therefore, find CIC is not a *related service* as defined by the applicable statutes and regulations." (emphasis added)

(4) "The ARD Committee determined that the child in question qualified for early childhood development because of her orthopedic handicap and would require a program to improve her gross and fine motor skills. The education plan set forth has long-range goals to increase the child's abilities in these areas of development so as to prepare her for her school program when she reached the appropriate age, and to develop the child's self-help and living skills . . . No evidence exists in the record that CIC is, in any way, related to achieving these goals." (P. Ex. 5a, b, c; R. Vol. 3 p. 137)

Having made the foregoing findings, the State Board of Education held:

(1) "Based upon the evidence and foregoing findings of fact, we conclude that CIC is *medical treatment* of a diseased state." (emphasis added)

(2) "Based upon the evidence and foregoing findings of fact, we conclude that the IEP developed by the District's ARD Committee *meets the standards of the state educational agency* and provides the child in question a *free appropriate public education* within the intent and meaning of applicable statutes and regulations." (emphasis added) (Pl. Ex. 5a, b, c; R. Vol. 3 p. 137)

The full text of the State Board's decision is found in the record of the administrative hearings. (Pl. Ex. 5a, b, c; R. Vol. 3 p. 137)

On October 12, 1979, the Tatros commenced an action for injunctive relief and money damages against the State of Texas, the State Board of Education, the Texas Education Agency, the Board of Trustees for the Irving Independent School District, and J. F. Townley, Individually and as Superintendent of the Irving Independent School District. The complaint alleged that the District and the State had failed to provide Amber with a free appropriate public education because the provision of CIC was not provided Amber in violation of the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; and the Civil Rights Act, 42 U.S.C. § 1983.

On November 8, 1979, the Tatros amended their complaint adding additional defendants and filed an application for preliminary injunction. On November 15, 1979, prior to all defendants being before the Court, the Tatros filed "Proposed Stipulation of Facts."

On December 21, 1979, the District Court denied the Tatros' application for preliminary injunction and granted Defendant Townley's motion to dismiss. (Pet. App. 86a; *Tatro* v. *Texas*, 481 F.Supp. 1224 (1979), "Tatro I").

The District Court held *related* services required to be provided must be "related" to the special education (Pet. App. 88a), that CIC is required whether or not Amber is attending school (Pet. App. 89a), and that CIC is not any more related to "special education" than other requisites to her existence (Pet. App. 89a). The District Court further found no congressional intent to sweep broadly in its usage of the word "related," instead the Court found that to be related in the statutory sense, the service requirement must arise from the effort to educate (Pet. App. 89a).

In denying relief under the Rehabilitation Act of 1973, specifically, 29 U.S.C. § 794, the Court found the School District's refusing to *affirmatively* provide catheterization was not denying Amber the benefits of, nor effectively excluding Amber from, a federally-funded program. The District Court held the Rehabilitation Act could not be interpreted as requiring a school to furnish catheterization that Amber would need regardless of whether she is taking advantage of any educational programs (Pet. App. 91a). The District Court further held the Tatros could not convert a statute prohibiting discrimination in certain governmental programs to a statute requiring the setting up of governmental health care for people seeking to participate in such programs (Pet. App. 92a).[2]

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[2] The Tatros had asserted no alternative had been given them but for one of them to attend Amber's needs during the school day. The District Court found such assertion to be ambiguous and said, "In

The Tatros appealed. The panel of the Court of Appeals of the Fifth Circuit vacated and remanded (Pet. App. 94a-109a; *Tatro* v. *Texas*, 625 F.2d 557 (J. Goldberg) (1980), "Tatro I"). It said that without the provision of CIC, Amber cannot benefit from special education because without it she cannot be present in the classroom; therefore, CIC is a supportive service required to assist Amber to benefit from special education. The *Tatro I* panel found the District Court erred in limiting the literal words of 20 U.S.C. § 1401(17) and limiting the scope of "related services" to avoid requiring every necessary life-support system be furnished (Pet. App. 104a). The *Tatro I* panel held that the Education of All Handicapped Children Act contained its own limitations on the type of life-support services that must be provided as related services and said, "A life-support service would not be a related service if it did not have to be provided during school hours, but instead could be performed at some other time" (Pet. App. 105a). Further, the Court said, "The life-support service must be one which a nurse or other qualified person can perform. Excluded from the term 'related services' are those health-related activities which must be performed by a licensed physician that are not provided to determine a child's medically related

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light of the complaint, the Plaintiffs' brief taken as a whole, Plaintiffs' proposed stipulation of facts, and a conference held in chambers, the most reasonable interpretation of that assertion is that Amber's participation in the program is conditioned on either her parents or her parents' agents providing catheterization. This is simply the corollary to the decision to not provide CIC to Amber, and is permissible under the Rehabilitation Act." (Pet. App. 92a) The context in which the Court considered the "proposed stipulation of facts" has been overlooked or misapplied by the panel(s) of the Court of Appeals in their subsequent opinions.

handicapping condition which results in the child's need for special education and related services" (Pet. App. 105a).[3]

In holding the School District's failure to provide CIC violated Section 504 of the Rehabilitation Act of 1973, the *Tatro I* panel held the District Court was incorrect in holding the statute prohibiting discrimination could not be converted to a statute requiring setting up of governmental health care for people seeking to participate in certain governmental programs (Pet. App. 107a). The *Tatro I* Court then held Amber had been excluded from the School District's programs by the District's refusal to provide CIC to Amber (Pet. App. 108a).

The decision of the Court of Appeals in *Tatro I* was based on assumed facts with no findings upon which to rely for its review (fn 1 to the Court's Opinion, Pet. App. 95a, 625 F.2d at 558).[4]

On remand, the School District moved to dismiss the complaint on the grounds that the Plaintiffs had failed to name a necessary party, the U.S. Commissioner of Education or the Office of Education; that Plaintiffs had not

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[3] This is the corollary to holding all life support services would be a "related service" if required during school hours. Thus, the Court's example of insulin injections would have to be provided if the doctor prescribed it during school hours, as well as kidney dialysis, to which the Court referred in fn 19 at Pet. App. 108a-198a.

[4] The Fifth Circuit had consistently refused to review cases of such nature because of incomplete and inconclusive record(s) on appeal. Its normal procedure was to vacate and remand for findings of fact and/or further proceedings. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1970) (J. Goldberg); *Echols* v. *Sullivan*, 521 F.2d 206 (5th Cir. 1975) (per curiam); *Mayo* v. *Lakeland Highlands Canning Co.*, (1940) 309 U.S. 310, 316, 60 S.Ct. 517, 520.

invoked the Court's jurisdiction; and that Plaintiffs had failed to state a claim on which relief could be granted. (R. Vol. 1 p. 99) The State Defendants moved to dismiss on the ground that the Plaintiff's suit was barred as to them by the 11th Amendment and the doctrines of judicial and legislative immunity.

The District Court granted the State Defendants' motion to dismiss as it pertains to retrospective relief and denied the motions to dismiss for lack of subject matter jurisdiction, for failure to properly plead federal financial assistance, for failure to state any cause of action under Section 504, and for failure to join indispensable parties. It deferred disposition of the State Defendants' motion to dismiss and the School District's motion to dismiss for failure to state a cause of action for damages under the Education of All Handicapped Children Act, Section 504, or 42 U.S.C. § 1983, and proceeded to trial on the merits. (R. Vol. 1 p. 136)

On May 26, 1981, the District Court issued an order that the State Board of Education and the Irving Independent School District modify Amber's IEP to include the provision of CIC *in accordance with and as prescribed by a valid medical prescription provided by Amber.* The Court also awarded Plaintiffs damages and attorney's fees and expenses in the amount of $28,502.00 (Pet. App. 53a, 54a). The District Court issued two separate opinions stating its findings of fact and conclusions of law (Pet. App. 1a-36a, 516 F.Supp. 968; Pet. App. 55a-61a, unpublished). It amended its judgment awarding damages against the School District, and ordered recovery of attorney's fees from the School District and the State Board of Education, jointly and severally (Pet. App. 62a, 63a). The Court denied all other relief, dismissed the State's Commissioner of Education in his official and indi-

vidual capacity, dismissed the State Board of Education and the District's Board of Trustees in their individual capacities, and dismissed the State of Texas and the Texas State Education Agency (Pet. App. 6a-9a).

The Court held that under state law, the School District *could not* lawfully provide CIC without a valid medical prescription from a licensed physician; that under the Texas Medical Practice Act, the physician may delegate prescribed medical treatment to an individual or an institution; and that, when delegated, the individual or institution may then lawfully perform the medical treatment. Thus, the Court held, the physician may prescribe CIC and delegate to the School District, or its employees, the actual performance of the delegated medical treatment. It further held that the School District must secure the services of persons sufficiently trained so that a treating physician may delegate to them the medical treatment he prescribes (Pet. App. 12a, 13a).

Having concluded the School District and its employees could, therefore, lawfully treat Amber's neurogenic bladder with CIC under Texas law, it proceeded to hold that CIC was a "school health service" as defined at 34 C.F.R. § 300.13(b)(10), and not a "medical service" within the meaning of 20 U.S.C. § 1401(17) or 34 C.F.R. § 300.13(b)(4) (Pet. App. 14a).

The Court said that Amber is not required to accept any risk in order to attend school, and thus found she will require CIC during school hours if she is to attend the District's half-day program. The Court then held that CIC was a "related service" as defined in 20 U.S.C. § 1401(17) "required to assist Amber to benefit from special education" (Pet. App. 15a).

The Court, feeling constrained by *Tatro I*, ordered the District to modify Amber's IEP to include the requested

medical treatment. Although the District Court was not convinced Section 504 of the Rehabilitation Act of 1973 was applicable in view of *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), *without finding a specific violation of Section 504*, but for reasons of institutional order, it awarded reasonable attorney's fees to Plaintiffs under 29 U.S.C. § 794a(b) (Pet. App. 30a-32a).

The School District and the State Board of Education Appealed. The panel of the Court of Appeals for the Fifth Circuit ("Tatro II") affirmed (Pet. App. 65a-83a, 703 F.2d 823), relying on the panel's decision in *Tatro I* and "law of the case doctrine." Even though the *Tatro II* Court said, "Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's educational program" (Pet. App. 67a), and although it would have taken a different view of EAHCA upon de novo consideration (Pet. App. 68a), it felt constrained to follow *Tatro I*.

A petition for rehearing en banc was denied. A petition for a writ of certiorari was filed on October 3, 1983. Certiorari was granted on December 5, 1983.

SUMMARY OF THE ARGUMENT

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA), is a funding statute. It did not create a federal right to education nor a federal right to free appropriate medical treatment in order to receive a "free appropriate public education."

That term describes the limitations of the State's undertaking when it submits its plan to the Secretary for the purpose of obtaining his approval as a condition for

federal funds appropriated pursuant to the Act. In accepting federal funds, the states do not undertake to provide particular methods of educating handicapped children.

The State Plan approved by the Secretary does not include provisions for delivery of medical treatment prescribed by a doctor. The State was not aware of any obligation of providing medical treatment as a condition of receiving EAHCA funds, nor did it knowingly accept such a condition. If Congress intended to do so, it did not do so unambiguously.

The District Court and the Court of Appeals should have dismissed the complaint when it was demonstrated the education programs made available by the School District for the education of Respondent met the "standards of the State Educational Agency," and were in conformity with the State Plan approved by the Secretary.

Assuming, arguendo, that there is an enforceable private right to "free appropriate public education," the definition adopted by the Court of Appeals and the District Court of "related services" is not authorized by the Act, is contrary to the statute and Congressional intent, and is incapable of implementation. The District Court erred in looking to the State's Medical Practice Act to define "related services" and "school health services" instead of limiting its inquiry to the definition contained in the Act and the State Plan approved by the Secretary.

The Act's provisions for judicial review do not enlarge the scope of the state's obligations. In finding a potential harmful effect, or risk of injury, if Amber attended the requested and recommended educational setting or placement without the medical treatment prescribed by her doctor, the District Court ordered the School District to modify Amber's IEP to provide for the medical treatment

as prescribed by her personal physician. The Court's finding of a potential harmful effect did not entitle the Court to rewrite the IEP and enlarge the scope of the State's obligations. It could have, and should have, remanded to the local educational agency to place Amber in one of the available alternative placements provided for in the State Plan so Amber could receive the special education contained in her IEP without risk of injury.

The allegations and findings concerning a violation of § 504 of the 1973 Rehabilitation Act arise from the same factual underpinnings as the statutory claim under EAHCA. The Courts below erred in granting any relief under § 504. Where the allegations and facts are the same as those asserting an EAHCA violation, the remedies provided by EAHCA provide the exclusive basis through which to challenge state and local compliance. Further, they would create obligations contrary to the Court's decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981) and *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979).

ARGUMENT

1. The Education For All Handicapped Children Act, 20 U.S.C. § 1401 Et Seq., Does Not Require Petitioner To Furnish Respondent Medical Treatment In Order To Provide Her A "Free Appropriate Public Education."

(a) By denying petitioner's "motion to dismiss" and "requested findings of fact and additional conclusions of law," the courts below have assumed, if not expressly held, 20 U.S.C. § 1412 creates a federal right to medical treatment.

In view of *Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. 1531 (1981), the District Court clearly erred in denying Appellant's "Requested

Amended and Additional Conclusions of Law," and in ordering the Appellant to modify Plaintiff's Individual Education Plan to include the medical treatment as prescribed by her personal physician.

EAHCA was enacted by Congress in the exercise of its Spending Power, *Board of Education of the Hendrick Hudson Central School District Board of Education* v. *Amy Rowley*, ___ U.S. ___, 102 S.Ct. 3034 (1982), at 3042, n.11, and 3049, n.26. By accepting the federal funds, the state and local educational agencies enter into an agreement much in the nature of a contract. In return for the funds, "the states agree to comply with federally imposed conditions." *Pennhurst, supra*, at 1539. However, the states must be able to voluntarily and knowingly accept the terms of the "contract."

"There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously." *Pennhurst, supra*, at 1539.

The EAHCA was enacted by Congress for the purpose of assisting the states in providing educational opportunity for each handicapped child, and encouraging innovation and research in the field of special education, *Eberle* v. *Board of Public Education*, 444 F.Supp. 41, 43 (D.Pa. 1977), aff'd 582 F.2d 1274 (3rd Cir. 1978), *Rowley, supra*, at 3037.

Subchapter II, entitled "Assistance for Education of All Handicapped Children," 20 U.S.C. §§ 1411-1420, sets forth the relevant portions of the statute. Section 1412 details what each state must do in order to qualify for federal funds. It only establishes general conditions in order for the state to qualify for the applicable funds.

Specifically, Section 1412 requires a "State Plan," the contents of which are set forth in Section 1413.

The funds provided for under EAHCA are to be used to meet "excess costs," 20 U.S.C. § 1414(a)(1). "Excess costs" are costs over and above the school's average annual per-pupil expenditures.

The "Commissioner" shall approve any "State Plan." He shall disapprove any "State Plan" which does not meet the requirements of § 1413(a) and (b), see § 1413(1).

If the state fails to comply with §§ 1412 or 1413, it is subject to the provisions and sanctions of Section 1416. In this manner, Congress has provided for an enforcement mechanism where a state chooses to avail itself of the funding statute but does not comply with its provisions.

To satisfy eligibility requirements, 20 U.S.C. § 1412(6) requires the state to assure the provisions of Subchapter II are carried out by local educational agencies. The regulations implementing EAHCA require the state to adopt effective procedures for compelling local educational agencies to comply with the "State Plan." Procedures are established for withholding funds to a local educational agency which fails to comply with the "State Plan."

The only rights created by EAHCA on behalf of the Respondent are procedural and those substantive rights to a "free appropriate public education" which are discussed in *Rowley, supra*, at 3041, 3042. Although Section 1415 creates certain procedural rights on behalf of the individual handicapped student, Plaintiffs did not allege, nor did the District Court find, a violation of any of the procedural rights granted by § 1415. Respondents did not complain of the evaluation, nor assert a violation of the State Plan.

Any rights created by § 1415, enforceable against the Petitioner, are limited to a showing Petitioner has violated the "State Plan." This they did not attempt to do. Without a finding that the local educational agency has violated the provisions of the "State Plan" as required by § 1413, any "relief may well be limited to enjoining the federal government from providing funds to the [State]." *Pennhurst, supra,* at 1545 (referring to funding statutes).

The legislative history of the 1975 amendments to the Act clearly reveals the purpose of the statute is to implement the "right to education" previously recognized by the several states, and not a "right to education" recognized by the federal government. Thus, at the time of enactment, the state was providing education for the handicapped and had provided its citizens a "right to education." Congress was only recognizing these efforts by the states and was providing encouragement with financial assistance to the states in promoting their efforts in this regard. It was not creating that which the state had already created.

In attempting to understand Congress' intent in enacting the EAHCA, we must begin by looking at the statute itself. *Cannon* v. *University of Chicago,* 441 U.S. 677, 689; 99 S.Ct. 1946, 1953 (1979). The Court must examine the meaning of the words, and the context in which those words appear. *District of Columbia* v. *Carter,* 409 U.S. 418, 420; 93 S.Ct. 602, 604 (1973).

In *Pennhurst,* the U.S. Supreme Court again looked to this rule of statutory construction:

> "In expounding a statute, we must not be guided by a single sentence, but look to the provisions of the whole law and to its object and policy, *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975), quoting *United*

States v. *Hleis of Boisdorf*, 8 How. 113, 122 (1849)." *Pennhurst, supra*, at 1540.

Having done so, the Pennhurst Court concluded:

> "The legislative history buttresses our conclusion that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled. The House Committee believed the purpose of the Act was simply to continue an existing federal grant program." *Id.* at 1541.

When the meaning of the statutory words is in doubt, the Court may look to the sponsors of the statute. "[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Adm.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 96 S.Ct. 2295, 2304 (1975). In doing so, it becomes clear that the overriding congressional concern was meeting the needs of handicapped children. The elaborate system of procedural safeguards contained in 20 U.S.C. § 1415 was thought to be the best method of assuring appropriate program decisions. Due process hearings were required, said Senator Stafford, to assure that the rights of the children would be protected, 121 Cong.Rec. 37412 (1975). Senator Harrison Williams praised the section because it would "assure that the state and local agencies did not make inappropriate decisions regarding the identification, evaluation, and educational placement of handicapped children." 121 Cong.Rec. 37415 (1975). As the Sponsors interpreted the Act, the rights of handicapped children would be protected by the combined effort of all the procedures contained in Section 1415, including Section 1415(e), because the result would enhance proper evaluation and eduational placement of the child.

Applying these principles, *Pennhurst State School & Hospital* v. *Halderman, supra*, and *Rowley, supra*, to

this case, it is clear Congress enacted the EAHCA only in order to aid the states in educating their handicapped children by providing the necessary funds. For as Congressman Carl Perkins noted, educating handicapped children "created enormous financial burdens for already overburdened local and state educational resources." 121 Cong. Rec. 37025 (1975). The legislative history shows an emphasis on procedural safeguards to assure appropriate placement, a recognition that diagnosis of special educational problems was difficult and uncertain and an awareness of severe budgeting constraints.

By applying the principles learned in *Pennhurst* and *Rowley*, there is nothing in the EAHCA or its legislative history to even suggest that Congress intended to require the states to assume the high cost of providing medical treatment, prescribed by a private physician, for their handicapped students so they can receive a "free appropriate public education." There is even less to support the view that Congress intended that private physicians may obligate the expenditure of massive federal and state funds by merely prescribing medical treatment for their patients and delegating the furnishing of such treatment of their patients to the local public school. One can only conclude, therefore, that whatever Congress intended, it certainly didn't intend for this result to occur.

(b) The definition of "related services" formulated by the District Court and the Court of Appeals is contrary to EAHCA and should be reversed.

(1) Although a definition of a "free appropriate public education," "special education," and "related services" is contained in EAHCA, the Courts below have ignored those definitions and formulated one which is unnecessary, which is contrary to congressional intent, and which is incapable of implementation.

EAHCA defines "related services" to mean:

> "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 U.S.C. § 1401(17). (Emphasis added.)

The regulations implementing EAHCA expand this definition to include "school health services." 34 C.F.R. 300.13(a). The regulations define "medical services" to mean:

> "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services," 34 C.F.R. 300.13(b)(4),

and define "school health services" to mean:

> "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.13(b)(10).

EAHCA defines "special education to mean:

> "Specially-designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions," 20 U.S.C. § 1401(16).

Taken together, these definitions delineate the scope of education to be provided to handicapped children under EAHCA.

The Court of Appeals and the District Court, on remand, defined "related services" by attempting to choose

between two alternatives, i.e., whether the prescribed medical treatment is a "medical service" or a "school health service." Either result begs the question. The issue is whether EAHCA creates a right to medical treatment at all.

It is not who, under state law, may lawfully administer medical treatment; who may prescribe and delegate it; nor to what extent delivery of the treatment must be supervised, or by whom. It is the nature and purpose of the service which is determinative, not who may be legally authorized to provide it. To find to the contrary is to hold that Congress conditioned the grant of federal funds on the states agreeing to underwrite the massive financial obligations involved in providing all medical treatment physicians may unilaterally choose to prescribe for the more than eight (8) million children with handicapping conditions.

The EAHCA contains its own definition of "related services." "Medical services" are for diagnosis and evaluation purposes only, regardless of who may provide them. Providing for diagnosis and evaluation satisfies, in part, the goals and purposes of EAHCA to provide for identification and evaluation for the some four (4) million handicapped children who Congress found were not receiving any specialized educational services.[5] Congress was obviously not concerned with who the states authorized to provide diagnostic or evaluative services, but only that they be provided.

The District Court believed "the implementing regulations shed a little more light" on the statutory definition of

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[5] This Court discussed these findings and legislative history in *Rowley* at 102 S.Ct. 3045.

"related services" and "medical services." Petitioner submits they do not. The darkness still prevails unless the Court first holds that EAHCA requires the states and local educational agencies to deliver medical treatment.

The interpretation of a statute by the agency charged with its implementation should "shed some light" and may be entitled to some deference if they do. This Court has consistently held, however, that "such deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history," *Teamsters* v. *Daniel*, 439 U.S. 551, 556 n.20, 99 S.Ct. 790, 800 n.20 (1979). Any deference to the subject regulations in this case is further constrained in view of the agency's interpretation of its own regulations.

On January 14, 1981, the former Secretary issued notice of interpretation of the subject provisions (46 F.R. 4912; Jan. 19, 1981). This notice interpreted Part B of the Education of the Handicapped Act and Section 504 of the Rehabilitation Act of 1973 to require public educational agencies to provide CIC as a "related service" to handicapped children entitled to receive services under these statutes.

Subsequently, the effective date of the interpretation was postponed until March 30, 1981 (46 F.R. 12495; Feb. 17, 1981); a notice of further postponement until May 10, 1981, was published (46 F.R. 18975, Mar. 27, 1981); and a notice of proposed suspension of the interpretation was published (46 F.R. 19002; Mar. 27, 1981).

The last word from the Secretary was to postpone the interpretation until further notice (46 F.R. 25614; May 8, 1981). The published reasons for postponement included:

> "The Secretary is also concerned that the differentiation between related services and medical services

> be clarified. The Secretary declines to issue an interpretation *based on regulations that are ambiguous and subject to review*. 46 F.R. 25614. (Emphasis added.)

As construed and applied by the Courts below, the "delphic" regulations implementing EAHCA and § 504 of the Rehabilitation Act of 1973 go beyond the carefully-worded provisions of the respective statutes, and exceed the powers of the agency(s). The agency(s) have no authority to rewrite the statute(s) by means of regulations, creating duties not contemplated by Congress. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410, S.Ct. 2361, 2369 (1979); *Pennhurst State School & Hospital* v. *Halderman*, *supra*, at 1540; see also the concurring opinion of Chief Justice Burger, *University of Texas* v. *Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, at 1835, 1836. If the implementing regulations "shed any light" on the intent and meaning of 20 U.S.C. § 1401(17) and 29 U.S.C. § 794, the light doesn't shine on the U.S. Department of Education. Further, looking to state law to interpret an act of Congress short-circuits the system and fails to turn the darkness into light or remove the ambiguities.

Under EAHCA and the Rehabilitation Act, the state agencies are only encouraged to adopt and implement policies and procedures which provide the special needs of handicapped students. The statutes in question clearly reveal Congress knew how to provide for the medical treatment of public school students and how to provide for their educational needs where it wished to do so. The language, purpose, nor history of EAHCA reveal any intent to require the public schools of the respective states to provide medical treatment prescribed by private physicians, much less require them to secure services of trained medical personnel so the physician can delegate the medical treatment desired.

"Medical services" for any purpose other than diagnostic or evaluation are simply not required by the statute. For purposes of diagnosis and evaluation, they may be provided by a licensed physician or a "qualified school nurse or other qualified persons." The implementing regulations cannot require more.

(2) Assuming, arguendo, the regulations properly obligate the School District to provide medical treatment as a "school health service," the District Court was still wrong in ordering the District to modify Amber's IEP to provide the medical treatment prescribed by her physician.

The District Court found the Texas Medical Practice Act sufficiently authorized the physician to delegate the prescribed medical treatment; and, therefore, the School District could provide the prescribed medical treatment without violating the Medical Practice Act. The Court had also found the School District could not lawfully provide the medical treatment unless it and the physician complied with the Medical Practice Act and/or the Nurses Practice Act (Pet. App. 12a-13a). Even with these findings, the conclusion of the Court is still erroneous because it is still not required by EAHCA and its implementing regulations, as "delphic" as they are.

For the School District to lawfully deliver the medical treatment, the "services of a licensed physician" are still required, which are not for diagnosis or evaluation of a handicapping condition; and, thus, the medical treatment is not required. The following "services of a licensed physician" are clearly required, as reflected by the record in this case (Pet. App. 37a-52a):

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the treatment;

(4) determine if the treatment is properly performed and is progressing without complication;

(5) prepare the prescription and determine its content;

(6) delegate its performance and parameters;

(7) monitor the patient's progress and perform the numerous physician duties discussed in Amicus Brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand (Pet. App. 37a).

The Court of Appeals in *Tatro I*, in holding the medical treatment in question to be a "related service," said:

> "*Excluded* from the term 'related services' are those health-related activities which must be performed by a licensed physician that are not provided 'to determine a child's medically related handicapping condition which results in the child's need for special education and related services.' " (Pet. App. 105a) (Emphasis added.)

The District Court found the School District could not lawfully provide the medical treatment, i.e., the "life support services," without the foregoing described services of a licensed physician. Thus, under the Court of Appeals' own definition of "related services," the medical treatment prescribed cannot be a "related service" because of the Court's exclusion of licensed physician services not for diagnosis or evaluation. The physician must prescribe and delegate so the School District can treat the child as prescribed.

Thus it is clear services of a licensed physician are required, and the medical treatment is *excluded* from "related services" by the Court's own definition.

2. Requiring The Petitioner To Provide Respondent Medical Treatment Prescribed By Her Private Physician Is Not Required By EAHCA Or The Rehabilitation Act Of 1973, § 504.

The Courts below read the scope of the rights created by EAHCA and § 504 of the 1973 Rehabilitation Act too broadly, and exceeded their remedial powers in compelling the District to provide medical treatment as might be prescribed by a private, treating physician of a public-school student.

Section 504, the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794, only prohibits discrimination in programs or activities receiving federal financial assistance. Standing alone, it creates no rights nor confers any benefits on the Petitioner's students. The Respondent cannot, solely because of her handicap, be excluded from participation in, or be denied the benefits of, any program or activity operated by the Petitioner for which it receives federal funds. The program or activity in question is asserted to be the Petitioner's educational programs for handicapped students. If medical treatment for Respondent is not required to be provided by Petitioner under EAHCA, it is not required by § 504.

The decision of the District Court and the Court of Appeals, if not reversed, will evade state and local authority in providing a "free apropriate public education" and set standards outside the intent of Congress, contrary to this Court's decision in *Board of Education of the Hendrick Hudson Central School District Board of Education, et al.*, v. *Rowley*.

A "free appropriate public education" is defined in the Act as:

> ". . . special education and related service which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) *meet the standards of the state education agency*, (C) include an apropriate pre-school, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program. . . ." 20 U.S.C. § 1401(18). (Emphasis supplied.)

The definition of "special education" as included above is:

> " . . . specially designed *instruction*, at no cost to parents or guardians, to meet the *unique* needs of a handicapped child, including classroom instruction, instruction in physical education, *home instruction*, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16). (Emphasis supplied.)

The term "related services" means:

> "Transportation and other developmental, corrective, and other supportive services . . . as may be required to *assist* a handicapped child to benefit from *special education*." 20 U.S.C. § 1401(17). (Emphasis supplied.)

The term "individualized education program" means:

> "A written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child and the extent to which such child will be able to participate in regular educational programs. . . ." 20 U.S.C. § 1401(19). (Emphasis supplied.)

The regulations implementing EAHCA provide that:

> "(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special educational and related services.
>
> "(b) The continuum required under paragraph (a) of this section must:
>
> (1) Include the *alternative placements* listed in the definition of special education . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) . . . ." 34 C.F.R. 300.551. (Emphasis supplied.)
>
> "In selecting the least restrictive environment, consideration is given to any *potential harmful effect* on the child or on the quality of services which he or she needs." 34 C.F.R. 300.552(d). (Emphasis supplied.)

EAHCA recognizes the importance of local decision-making and its requirement that an individual education program be developed for each handicapped child. 20 U.S.C. § 1414(a)(5) and 20 U.S.C. § 1401(19). The educational agency, based upon its expertise in the field of education of handicapped children and upon the "unique" needs of the particular child, develops an individualized education program (IEP) for the child.

Nowhere in EAHCA, nor its legislative history, can it be found Congress intended to require medical treatment be provided so the child can reach "maximum potential" or so the child can receive a "free appropriate public education."

The goal of the educational agency for the particular child may differ depending upon the intelligence level of the child - the goal for a severely retarded child may be to achieve self-sufficiency (a goal which may or may not be

met depending upon the severity of the handicapped) - or where a handicapped child has average or above-average intelligence, the goal of the school system may be to enable the child to go from one grade to another and graduate with an average level of success. *Rowley, supra*, at 3049. The goal for an orthopedic handicapped child may be to develop the fine and gross motor skills to a level of self-sufficiency and refine such skills to the degree the child may be eventually educated in the regular classroom. More than that cannot be required of a public school system with regard to a handicapped child, anymore than it can be required with regard to a non-handicapped child.

The order of the District Court that the educational agencies were to modify Amber's IEP to provide for that medical treatment prescribed by her personal physician in order that Amber receive a "free appropriate public education" was based on the Court's interpretation of regulations implementing EAHCA, and state law governing the practice of medicine and nursing, *but without regard to any assertion or evidence the State Plan for educating its handicapped children was in violation of EAHCA or its implementing regulations.* The effect of the Court's decision is to hold that the handicapped student must be provided whatever medical treatment a doctor chooses to prescribe in order that the student receive a "free appropriate public education." Such holding is contrary to the language, purpose, and history of EAHCA and this Court's decision in *Rowley, supra.*

Congress passed EAHCA in response to the need for increasing funding. Although the Act sets forth general requirements states must meet in order to qualify for receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements, nor address medical treatment a physician may desire for his patient.

The heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement in education decision-making. Perhaps the most significant reason Congress failed to prescribe more specific standards is the traditional notion that education is primarily a state and local concern. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); *San Antonio School District* v. *Rodriquez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301.

Determining what constitutes a "free appropriate public education" is solely the responsibility of state and local educators. Unless the Court finds the procedural safeguards are violated, or the special education and related services set forth in the State Plan violate the federal Act, or the provisions of the State Plan are violated by the local education agency, there is no basis for finding a local educational agency must provide any specific service not included in the Act or the State Plan in order that the child receive a "free appropriate public education."

This Court in *Rowley, supra*, discussed the history and legislative purposes in detail. As the Court said,

> "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful." *Rowley, supra*, at 3043.

Once the handicapped child is provided access to the school system, he or she must then be provided services with the goal of achieving self-sufficiency. With regard to Amber Tatro, a pre-kindergarten student, there is no evidence to indicate Amber could not receive occupational therapy, physical therapy, and speech therapy in an educational setting of the early childhood development class or elsewhere, nor that the medical treatment pre-

scribed by her personal physician is necessary for her to receive or benefit from such educational services. There is absolutely no evidence that Amber was denied "access" to the school system.

The District Court and the Court of Appeals, however, would insist upon more. That in order to receive a "free appropriate public education," i.e., specialized instruction to meet her unique needs, the School District must provide the medical treatment prescribed by her doctor in the public schoolroom. Such a standard goes beyond both the "self-sufficiency" and the "equal-opportunity" standard expressed by Congress and discussed by this Court in *Rowley, supra*. Given the concerns expressed by Congress, it is inconceivable that any reliance could be placed on the legislative history of the Act to support a proposition that Congress intended to require school districts to provide sufficient time, money, effort, trained personnel, etc., to assure that every handicapped child is provided whatever medical treatment a doctor may desire in order that the handicapped child achieves his or her maximum potential and be educated in the "regular" classroom as a condition to receiving the funds appropriated by Congress.

Whatever is desired of the substantive content of a "free appropriate public education," Congress believed that compliance with required procedures of the Act would assure much if not all of what was wished in the way of substantive content, *Rowley, supra*, at 3050. Adhering to and following the identification and evaluation procedures, a handicapping condition which adversely affects educational performance is diagnosed. An IEP is then developed which sets forth the "specially-designed instruction" to meet the unique needs of the child, and includes the "related services" required to assist the child to benefit from the "specially-designed" instruction.

When the IEP is developed, an educational setting for the child must be selected from the "continuum of alternative placements" which the local educational agency is required to have available. 34 C.F.R. 300.551. In doing so, it is to consider any "potential harmful effect" on the child of any contemplated placement. Where there is found to exist a substantial risk to the child's health and well-being, an alternative placement must be selected.

The District Court found there existed a risk of serious injury to Amber and that Amber is not required to accept such a risk in order to attend school (Pet. App. 15a). Thus, the Court found a "potential harmful effect" if Amber was placed in the educational setting requested by her parents, i.e., the early childhood classes for two and one-half hours. Rather than order the School District to provide Amber an alternative placement, the Court ordered the School District to modify Amber's IEP and to provide her the medical treatment prescribed by her physician in accordance with the physician's prescription. The Court further ordered the School District to secure the services of persons who are sufficiently trained to enable Amber's physician to prescribe so his prescription can be implemented by the School District (Pet. App. 13a). Such a result is not required in order that Amber receive a "free appropriate public education."

The standard of review by courts of suits brought under § 1415(e)(2) has been established by this Court:

> "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the Courts can require no more." *Rowley, supra*, at 3051.

As the Court noted:

> "This inquiry will require a court not only to satisfy itself that the state has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19)." *Rowley, supra,* at 3051, n.27.
>
> "In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the states. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley, supra,* at 3051.

Certainly, Amber is entitled to "specialized instruction" to meet her unique needs. If the particular setting desired by her parents is found to pose a "potential harmful effect" on the child, alternatives are to be available in order to deliver the "specialized instruction" contemplated in § 1401(16) of the Act. The Act does not require the educational agencies to eradicate the "potential harmful effect," but only to develop an IEP reasonably calculated to enable the child to receive educational benefits.

When the language of EAHCA, its purpose, and history are taken together with the teachings of this Court in *Southeastern, supra; Pennhurst, supra;* and *Rowley, supra,* it is clear no obligation is imposed on Petitioner to furnish and deliver the medical treatment prescribed by private physicians. Applying the standard of review articulated by this Court in *Rowley* can result in only one conclusion: the IEP developed for Amber meets the standards of the state educational agency and provides

her a "free appropriate public education." The State and this Petitioner have complied with the obligations imposed by Congress, and the courts can require no more.

3. The Granting Of Relief Under The Rehabilitation Act Of 1973 Conflicts With Prior Decisions Of This Court.

The District Court found no specific violation of the Rehabilitation Act. However, for reasons of institutional order, it held that 29 U.S.C. § 794a(b) authorized an award of attorney's fees (Pet. App. 32a). The Court of Appeals indicated its reluctance to find a violation of § 504 but felt constrained to follow the decision in *Tatro I* which determined that refusal to provide C.I.C. was a violation of Section 504 (Pet. App. 79a). The decision in *Tatro I* is not entirely clear regarding the finding of a § 504 violation. However, the finding is based either on the proposition that (1) 504 creates an affirmative obligation to provide C.I.C. in the educational arena, or (2) a violation of EAHCA also constitutes a violation of § 504. Petitioner submits that reliance on either proposition is improper.

The District Court in *Tatro I* held that Respondents could not convert a statute prohibiting discrimination in certain government programs to a statute requiring, in essence, the setting up of governmental health care for the people seeking to participate in such programs (Pet. App. 92a). The Court of Appeals in *Tatro I* specifically found that conclusion to be incorrect (Pet. App. 107a). The Court of Appeals in the instant appeal recognized the difficulty of reconciling the finding of *Tatro I* regarding § 504 with this Court's decision in *Pennhurst*, but felt constrained to follow *Tatro I*. Is the original conclusion of the District Court in *Tatro I* incorrect? Petitioner submits that the District Court's original conclusion was correct and that this Court's decision in *Southeastern* and *Pennhurst* specifically support that conclusion.

The Rehabilitation Act is a federal-state grant program. It is voluntary, and the states are given the choice of complying with the Act or foregoing federal funds. This Court has previously determined that neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. *Southeastern*, *supra*, 99 S.Ct. at 2369-70. This Court reiterated this general proposition as it relates to funding statutes in *Pennhurst*, stressing that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so. *Pennhurst*, *supra*, 101 S.Ct. at 1545. Simply stated, the language of § 504, which generally prohibits discrimination in federally funded programs, cannot be read to create an affirmative obligation to provide medical treatment to handicapped children to avoid general health risks. If the basis of the Court of Appeals' finding of a violation of § 504 in *Tatro I* was that such an affirmative obligation was created, such decision was erroneous and remains so. The reliance of the Court of Appeals in this appeal on the decision in *Tatro I* is, therefore, erroneous and in conflict with this Court's decision in *Southeastern* and *Pennhurst*. Furthermore, if the obligation can somehow be argued to have been created through the implementing regulations, then such regulations constitute an unauthorized extension of the obligation imposed by the Rehabilitation Act. *Southeastern*, *supra*, 99 S.Ct. at 2369. Therefore, the decision of the Court of Appeals, if based upon such unauthorized regulations, would be erroneous.

Therefore, even if an implied private right of action exists in favor of Respondents under § 504, no violation occurred; and the award of attorney's fees was erroneous.

The only alternative to reliance on the creation of affirmative action obligations by the Rehabilitation Act by the Court of Appeals in finding a § 504 violation can be the proposition that a violation of EAHCA automatically constitutes a violation of § 504. Respondents' statutory claim under § 504 arises from the same factual underpinnings as the claim under EAHCA. The Court of Appeals in *Tatro I* determined that failure to provide C.I.C. amounted to exclusion under § 504 since the child could not attend school without the procedure (Pet. App. 108a). However, this determination was based on assumed facts and the Court's assumption that C.I.C. would not create an undue burden, as would kidney dialysis, and thus run afoul of this Court's decision in *Southeastern* (Pet. App. 109a). The Court, however, failed to recognize that regardless of costs or administrative burdens, if the procedure is required by the EAHCA, it must be provided at no cost. Thus, a paradox arises. A procedure which would be extremely costly and create undue burdens would not be required by § 504 by virtue of *Southeastern*. However, it would still be required by the EAHCA since the special education and related services are required to be provided at public expense regardless of cost or burden. The argument that the EAHCA remedies are exclusive, therefore, becomes apparent. In *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983) writ granted, ___ U.S. ___, the Court held that § 504 of the Rehabilitation Act is a general prohibition against discrimination and does not specifically apply to the education of handicapped children. 703 F.2d at 9. In view of *Pennhurst* and other cases questioning the existence of a private right of action under § 504, the Court in *Smith*, recognizing the comprehensive remedial scheme of the EAHCA, rejected the allowance of attorney's fees pursuant to the Rehabilitation Act in a case factually depen-

dent on the EAHCA. The Seventh Circuit reached the same result in *Timms* v. *Metropolitan School District of Wabash County*, 718 F.2d 212 (7th Cir. 1983), determining that in view of *Rowley*, the EAHCA is the exclusive remedy. Therefore, if the finding of a § 504 violation in *Tatro I* was based on non-exclusivity as opposed to a determination that affirmative obligations were created by the Rehabilitation Act, such conclusion was erroneous. The Court of Appeals in the instant appeal relied totally on *Tatro I* in affirming the attorney's fees award under § 504, and such decision is also erroneous. Regardless of the basis for the finding of a § 504 violation, such finding by the District Court and Court of Appeals was erroneous.

CONCLUSION

The District Court and the Court of Appeals should have dismissed the complaint when Respondent failed to assert and/or establish the State Plan violated the Act, that Petitioner had violated the State Plan, or that the IEP did not meet the standards of the State Educational Agency. The definition of "related services" formulated by the Court of Appeals and, on remand, applied by the District Court and affirmed by the Court of Appeals was unnecessary, unworkable, and in derogation of legislative intent and prior decisions of this Court. In ordering provision of medical treatment and securing trained personnel so the private physician can prescribe and delegate whatever medical treatment he wants for his patient, when he wants it, the District Court failed to consider the services of the licensed physician that were required. The Court of Appeals affirmed for the reasons set forth in a prior

decision of the Court, in disregard of subsequent decisions of this Court.

Wherefore, Petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals and dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit of Irving Independent School District, Petitioner, have been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751, this the 18th day of January, 1984.

James W. Deatherage

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CLERK

No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI and MARY TATRO, individually and as Next Friends of AMBER TATRO, a Minor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Court

BRIEF FOR RESPONDENTS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether clean intermittent catheterization for a child such as Amber Tatro is a "related service" within the meaning of the Education of the Handicapped Act, as amended.

2. Whether clean intermittent catheterization for a child such as Amber Tatro is a "supplementary aid or service" within the meaning of Section 612(5)(B) of the Education of the Handicapped Act, as amended.

3. Whether the requirement of clean intermittent catheterization as a related or supplementary service for a child such as Amber Tatro is a reasonable condition imposed on Petitioner for the receipt of federal funds under the Education of the Handicapped Act, as amended.

4. Whether clean intermittent catheterization for a child such as Amber Tatro is a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act, as amended.

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STATEMENT OF THE CASE

Amber Tatro is a mentally and emotionally normal[1] female child who is disabled by the birth defect of myelodysplasia, more widely known as "spina bifida" ("open spine"). Record, Trial Transcript ("Tr.") at 13-14, 95-96, and elsewhere. Amber was three and a half years old at the time of the June 19, 1979 Impartial Hearing—Record, Plaintiffs' Exhibit 5b (Tr. 137), Impartial Hearing Transcript ("I.H.Tr.") at 67—five at the time of trial, 516 F.Supp. 970; seven at the time of the Court of Appeals' second decision, 703 F.2d 825, and is now eight years old. Amber is agreed to be "orthopedically handicapped" within the meaning of 20 U.S.C. § 1401(1), 34 C.F.R. § 300.5(b)(6). Further, she was found by the Impartial Hearing Officer to be "other health impaired" within the meaning of 20 U.S.C. § 1401(1), 34 C.F.R. § 300.5(b)(7). Pl. Exh. 5, *supra*, Decision of the Hearing Officer at 6-7.

Among the effects of Amber's handicapping condition are speech impediments, mobility impairment and a "neurogenic bladder." If Amber's bladder dysfunction, which includes an inability to empty her bladder voluntarily, is left chronically unattended, it will result in "reflux" pressure on the kidneys, causing infection and kidney damage. Pl. Exh. 5b, *supra*, I. H. Tr. 14-15; Tr. 234-235, and elsewhere. To avoid the harmful consequences described, it is necessary for Amber to be "catheterized" every three to four waking hours, by a process known as "clean intermittent catheterization" ("CIC"). Pl. Exh. 5b, *supra*, I. H. Tr. 27-28, 34-37, 65-67; Tr. 111, 238-239, 244; 516 F.Supp. 971, 974. She must be catheterized at least once during the "school day"[2] in order to

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[1] It is not contested that Amber is intellectually normal, nor has the school district or anyone else on record in this case asserted that she is emotionally disordered.

[2] Petitioner asserted at trial that the Admissions, Review, and Dismissal (ARD) Committee had determined, with the parents' agreement, that a two-and-a-half-hour day program was appropriate for Amber in May of 1979. Tr. 318. However, that time limitation was not specified anywhere in Amber's individual education plan (IEP). Tr. 325. "Early Childhood Development" classes are for pre-school age handicapped children. Brief for Petitioner ("Pet. Brief") at 3. Handicapped children are eligible for

attend school safely. Pl. Exh. 5b, *supra*, I. H. Tr. 29-30; Tr. 239-240, 244-245; 516 F.Supp. 977. Amber has been provided CIC since she was thirteen months old. Tr. 79. Prior to CIC, Amber had bladder infections approximately once every two months, lasting about six weeks on one occasion. Pl. Exh. 5b, *supra*, I. H. Tr. 67. Since being on CIC, Amber has had no such infections or other injuries or side effects.[3] *Id.* at 68; Tr. 80.

"Clean intermittent catheterization" ("CIC") is a very simple, safe, quick and effective process, capable of being performed by an average layperson with minimal training, whereby a small hollow tube is inserted about one-inch into the urethra in order to drain the bladder. 516 F.Supp. 974;

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public education at age 3, while five is the age of eligibility for regular public school. 20 U.S.C. § 1412(2)(B); TEX. EDUC. CODE §§ 16.104(c)(1), 21.031. At trial, Petitioner's witness Ms. Guy conceded that Amber, then five years old, might qualify for an educational program extending from 8:30 a.m. to 2:30 p.m. Tr. 326. Subsequently, Petitioner offered Amber a two-hour-and-forty-five-minute program, attempting to schedule it between the hours in which Amber usually needs catheterization. This was the subject of special proceedings on March 13, 1981. Transcript ("Tr. (3-13-81)") at 18-20. At that time it was announced, and noted by Judge Higginbotham as a "positive sign," that Amber would go to kindergarten the following September. Tr. (3-13-81) 34. At oral arguments before the Court of Appeals on November 16, 1982, it was not disputed that Amber, then seven years old, was in a regular first grade class. She now in fact attends a regular second grade class. (Amber's current IEP is attached as an Appendix to this Brief.) There, she is entitled by law to a minimum seven-hour day. TEX. EDUC. CODE § 21.004. State Board of Education Rules for Handicapped Students provide that: "Handicapped students shall have available an instructional day commensurate with that of nonhandicapped students." 19 Tex. Adm. Code § 89.235(d), as amended to take effect August 11, 1983; 8 Texas Register 2895 (July 29, 1983) at 2922. The predecessor rule, in effect since 1979, required: "Each handicapped student will have available a six-hour instructional day as is provided all other students." 19 T.A.C. former § 89.233(b). Consequently, it is misleading to continue to describe Amber as a "pre-kindergarten student" and her "educational setting" as "the early childhood classes for two and one-half hours." Pet. Brief at 31, 33.

[3]An exception occurred when, shortly after trial, Petitioner allowed Amber to remain in school all day uncatheterized—the subject of the March 13, 1981 proceedings.

Tr. 125-126, 128-130 (testimony of Phalia Findley), 144-146 (Dr. George Williamson),[4] 235-238, 241-245, 252, 268-269 (Dr. George Hurt);[5] Joint Appendix ("J. A.") at 11a (§ 2j). CIC was pioneered in the early 1970's, to replace "sterile catheterization." J. A. 9a (§ 2f); Pl. Exh. 5b, *supra*, I. H. Tr. 15-16. "Sterile catheterization" was "prohibitive" in cost, requiring an autoclave, an expensive piece of medical equipment, and not permitting the re-use of the catheters. *Id.* at 48, 144-147; Tr. 240-241. However, it has been established that CIC is as effective as sterile catheterization and entails no greater risk of infection. Pl. Exh. 5b, *supra*, I. H. Tr. at 17, 48; Tr. 240-241. The contrasting simplicity of CIC[6] was well described by the Court of Appeals below:

> CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clean; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the catheter is withdrawn; and the amount of urine collected

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[4] Director of Pediatric Rehabilitation, John F. Kennedy Medical Center, Addison, New Jersey; a member of the medical faculties of Columbia University and the State University of New York; author of publications and consultant to state education agencies concerning the education of handicapped children (especially children with spina bifida); Dr. Williamson has had extensive experience with CIC. Tr. 137-142.

[5] A licensed physician, board-certified in urology, with a special interest in the neurogenic bladder; a member of the Texas Association of Genitourinary Surgeons, American and Texas Urological Associations, American Pediatric Urology Association, American Academy of Pediatric Urology (serving on the Myelodysplasia Action Committee of the latter); Dr. Hurt has served hundreds of spina bifida children, specifically in CIC. Pl. Exh. 5b, *supra*, I. H. Tr. 11-12, 17; Tr. 233.

[6] In CIC, it is not necessary to sterilize the catheter. It is sufficient to wash the catheter with soap and water and rinse it before use and to wipe it off after use. Pl. Exh. 5b, *supra*, I. H. Tr. 18-19. Gloves do not have to be used and it is not necessary to touch the part of the catheter used for the catheterization. *Id.* at 18. The bacteria introduced through CIC are of the same type that already reside in the urethral vagina anyway. *Id.* Dr. Hurt testified that of hundreds of children on CIC in his experience, none had ever suffered a perforated urethra due to catheterization, as speculated by Petitioner. *Id.* at 42.

> is measured and noted. The procedure can be taught to anyone after a training session of approximately thirty minutes, and it need not be performed by a doctor or nurse. Currently, Amber is catheterized at home by her parents, teenage sibling, and babysitter. However, when Amber is eight or nine years-old, she will be able to perform CIC upon herself.

625 F.2d 559 n.3.

A physician or nurse does not have to perform CIC—anyone can be trained to do it. Pl. Exh. 5b, *supra*, I. H. Tr. at 19. Parents are taught to catheterize their children. *Id.* at 19, 60; J. A. 11a (§ 2j). Training to do CIC requires one session of approximately 30 minutes. Pl. Exh. 5b, *supra*, I. H. Tr. 19, 29. Mrs. Tatro has trained her husband, her thirteen-year-old son, her other daughter, Amber's babysitter, and the personnel of Amber's private pre-school (including the cook), to perform CIC. *Id.* at 64-65; Tr. 78-79. (While thirty minutes is the time usually required for training, Mrs. Tatro has been able to train people in less time than that. Tr. 79.) The actual procedure takes about five minutes to perform and can be done safely and effectively with even fewer steps than the simple process outlined in the Pretrial order, J. A. 9a-10a. Tr. 81-83, 241-242, 254-255.

Most children of normal intelligence with Amber's handicap eventually learn to catheterize themselves. Pl. Exh. 5b, *supra*, I. H. Tr. 19-20; Tr. 144-146, 242-243; J. A. 11a (§ 2k). At the time of the June 1979 Impartial Hearing, approximately 400 children were receiving CIC regularly in Dallas-area school districts, by "everybody from the school nurse down to the teacher of the classroom." Pl. Exh. 5b, *supra*, I. H. Tr. 19. Dr. Hurt and Scottish Rite Hospital have helped several school districts in the area set up CIC programs. *Id.* at 28. Dr. Hurt wrote to Dr. Richard Bates, the medical consultant (and former school board member) for Irving I.S.D. (and Petitioner's chief expert witness), offering to train Irving school personnel free in the administration of CIC, but received no response. *Id.* at 29; Tr. 370. See also Tr. 241-242, 255, 283-284, 288-289.

After Amber reached three years of age in October of 1978, the Tatros met with Irving school personnel in January and April of 1979, to advise the school district of Amber's need for CIC in order to attend school when she became eligible in September of 1979. Pl. Exh. 5b, *supra*, I. H. Tr. 62-64. In May of 1979, an Admissions, Review, and Dismissal (ARD) Committee[7] met to consider an educational program and placement for Amber. Although the Committee did not disagree that CIC was necessary in order for Amber to attend school, the Committee, over the parents' objections, refused to include CIC in Amber's individualized educational program (IEP), on the grounds that the provison of CIC would be contrary to school board policy.[8] Tr. 65-66.

Pursuant to their rights under 20 U.S.C. § 1415(b)(2), Amber and her parents complained to an Impartial Hearing Officer of the failure of Irving I.S.D. to include CIC as a "related service" in Amber's IEP. Pl. Exh. 5, *supra*. The Impartial Hearing Officer ruled that Amber is entitled to CIC as a related service needed to assist her to benefit from special education, which ruling was adopted as the Decision of the State Commissioner of Education in *Amber T. bnf Mary T. v. Irving Independent School District*, Texas Education Agency Docket No. 115-SE-579 (August 6, 1979).[9] Pl.

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[7] The ARD Committee is the entity identified in Texas Education Agency rules as responsible for implementing the requirements of 34 C.F.R. §§ 300.340-300.349, 300.550-300.554.

[8] At that time, the Irving I.S.D. Director of School Health Services, a registered nurse, was not acquainted with CIC, but only with sterile catheterization, which was preferred by the hospital with which she was most familiar. Pl. Exh. 5b, *supra*, I. H. Tr. 140-147. That hospital had not revised its cathererization policies since May of 1977, although the American Academy of Pediatrics had adopted an official position in October of 1978 favoring CIC over sterile catheterization. *Id.* at 151. Compare the views expressed by Dr. Bates, who did not specialize in urology, who had not practiced medicine since 1978, and who had no patients on CIC, Pl. Exh. 5b, *supra*, I. H. Tr. 127; Tr. 368, 373; and Dr. Ware, who was not a pediatric urologist, seldom treated children, and had no experience with CIC, Pl. Exh. 5b, *supra*, I. H. Tr. 49, 60.

[9] This Court has indicated in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), that great weight and deference should be given

Exh. 5, *supra*. Although precluded by 20 U.S.C. § 1415(e)(1) from reviewing the decision of the Impartial Hearing Officer,[10] the State Board of Education nevertheless reversed the Commissioner and Impartial Hearing Officer and upheld Irving I.S.D.'s refusal to provide CIC to Amber Tatro.

Following the unauthorized action of the State Board of Education, the Tatros filed suit in the United States District Court for the Northern District of Texas, Dallas Division, against the State of Texas, members of the State Board of Education, the Irving Independent School District, and the Irving I.S.D. superintendent and school board, seeking, *inter alia*, preliminary and permanent injunctive relief. On December 21, 1979, Hon. Patrick Higginbotham, U. S. District Judge, entered an order denying a preliminary injunction to require Defendant (Petitioner herein) to provide CIC to Amber.[11] *Tatro v. Texas*, 481 F.Supp. 1224 (N.D. Tex. 1979). The Tatros appealed to the U. S. Court of Appeals for the Fifth Circuit.

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to the decision of the Impartial Hearing Officer. *Id.* at 3051. *Accord:* "I believe that the District Court and Court of Appeals should have given greater deference than they did to the findings of the . . . impartial hearing officer and the State's Commissioner of Education . . ." *Id.* at 3053 (Blackmun, J., concurring).

[10]*Tatro II*, *infra*, at 703 F.2d 833-834 n. 10, citing *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981) at 805-806 & n. 9, *cert. denied* 455 U.S. 946 (1982). Since its participation in this case, the State Board of Education has removed itself from the impartial hearing process. 6 Texas Register 4265 (November 20, 1981), amending 19 T.A.C. Chapter 157, subchapter D. Under current rules in Texas, the Impartial Hearing Officer's decision is final.

[11]In response to the request of Plaintiffs (Respondents herein) for a preliminary injunction, Judge Higginbotham, instead of receiving the record of the administrative proceedings pursuant to 20 U.S.C. § 1415(e)(2), requested stipulations of fact. When Defendant Irving I.S.D. (Petitioner herein) refused either to agree to the Tatros' proposed stipulations or to submit proposed stipulations of its own, the Plaintiff Tatros submitted their proposed stipulations by the Court's deadline. The District Court based its first decision in the case on Plaintiff's proposed stipulations. 625 F.2d 558 n. 1, 516 F.Supp. 971. The District Court's ruling was equivalent to summary judgment or granting of a motion to dismiss, holding in effect that, as a matter of law, even if the facts were as Plaintiffs alleged, Amber was not legally entitled to the relief sought for her.

Because of the confusion surrounding the proposed stipulations solicited by the District Court and submitted by Plaintiffs, the Court of Appeals had no facts before it on appeal. However, the Court held as a matter of law that CIC is a valid related service, under 20 U.S.C. § 1401 *et seq.* and 29 U.S.C. § 794, which Petitioner is required to provide to a child such as Amber Tatro, to the extent that she needs such in order to attend school so that she can benefit from special education. *Tatro v. Texas* ("*Tatro I*"), 625 F.2d 557 (5th Cir. 1980). The Court of Appeals remanded the case to the District Court to determine whether the facts of the case were as assumed by the Circuit Court, based on the proposed stipulations, and whether any other material facts not previously considered should alter the result. *Id.* at 558 n. 1. Subsequently, the parties entered into stipulations in a Pre-Trial Order, J. A. 5a, and the District Court below took evidence at trial and in subsequent evidentiary hearings, on the basis of which Judge Higginbotham made findings of fact consistent with those assumed by the Court of Appeals on the prior appeal, ordered Defendants to provide CIC to Amber Tatro, and awarded limited damages and attorneys' fees to Plaintiffs. *Tatro v. Texas*, 516 F.Supp. 968 (N.D. Tex. 1981). From the subsequently modified final order, Appendix to Petition for Writ of Certiorari ("Pet. App.") at 55a, 62a, Defendants Irving I.S.D. and the State Board of Education appealed. On April 25, 1983, the Court of Appeals rendered its second decision in the case, *Tatro v. Texas* ("*Tatro II*"), 703 F.2d 823 (5th Cir. 1983), holding that neither its prior decision nor the District Court's subsequent decision were clearly erroneous and affirming the District Court decision. After its request for rehearing *en banc* was denied, Appellant Irving Independent School District petitioned this Court for a Writ of Certiorari, which was granted December 5, 1983. (The State Defendants did not argue against CIC for Amber at trial or on appeal to the Fifth Circuit and did not join in seeking this Court's review of the Court of Appeals' decision.)

SUMMARY OF ARGUMENT

Reversal of the legal requirement that public schools provide CIC to handicapped children such as Amber Tatro inevitably will result in the exclusion and segregation of such children from a free public school education. Those spina bifida children whose parents could not find, or afford to employ, a third party to travel to school each day to provide CIC to them, would be forced either to be segregated in separate schools exclusively for handicapped children or to receive educational services at home. Either alternative would deprive the child of the benefits of interaction with non-handicapped children in the normal public school setting, and each would be costlier to the taxpayers.

CIC is a "related service" needed to assist Amber to benefit from special education in that: (1) without CIC, Amber cannot be present in any school placement to receive and benefit from specialized instruction; (2) CIC is needed to enable Amber to realize the intended benefits of instruction in an integrated regular public school setting; and (3) CIC is essential to achieving the appropriate educational goal of self-catheterization, as identified in her current IEP (attached as an Appendix to this Brief). CIC is not an excluded "medical service" as that term is used in 20 U.S.C. § 1401(17), since all the features identified to characterize CIC as "medical treatment" are equally or more typical of other expressly designated related services.

Further, CIC is a special supplementary aid or service to enable Amber to be educated in, and preclude her removal from, the regular educational environment, as required by 20 U.S.C. § 1412(5)(B). The requirement of CIC for a handicapped child such as Amber is reasonably ascertainable from the terms of the EHA, which unambiguously imposes conditions for the receipt of federal funds under the Act.

Finally, CIC is a reasonable accommodation, which does not require fundamental alterations in Petitioner's program nor impose undue financial or administrative burdens. It is needed so that Amber Tatro, an otherwise qualified handicapped individual, will not be excluded from participation

in, denied the benefits of, or subjected to discrimination by Petitioner's federally assisted program, solely on the basis of her handicap, in contravention of Section 504 of the Rehabilitation Act, as amended.

ARGUMENT AND AUTHORITY

I. DENIAL OF CLEAN INTERMITTENT CATHETERIZATION WOULD RESULT IN THE EXCLUSION AND SEGREGATION OF AMBER TATRO AND SIMILARLY SITUATED HANDICAPPED CHILDREN FROM THE FREE PUBLIC SCHOOLS.

No party to this dispute must be under any illusion as to the consequences of rescinding the legal requirement that a public school system provide CIC to children such as Amber Tatro. Inevitably, denial of CIC will result in the exclusion and segregation of such children from the free public schools. The District Courts in both the instant case and in *Tokarcik v. Forest Hills School District*, C.A. No. 79-338 (W.D. Pa. October 31, 1980), reprinted at 3 E.H.L.R. 552:429 (1980), *affirmed* 665 F.2d 443 (3rd Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. _____, 102 S.Ct. 3508 (1982), found as a fact that a spina bifida child such as Amber cannot safely attend public school class through the school day without the availability of CIC. 516 F.Supp. at 971, 974, 977; 3 E.H.L.R. 552:428-429. The Third and Fifth Circuit Courts of Appeals affirmed these findings as facts of the case, entitled to deference as not clearly erroneous. 703 F.2d at 825, 829, 831; *Tokarcik, supra*, 665 F.2d at 444, 446, 456. The inevitable exclusion and segregation of children such as Amber, as a consequence of the denial of CIC, is the beginning point for analysis of Amber's rights herein under both the Education of the Handicapped Act, as amended by the Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* ("EHA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504").

Although at the May 1979 original ARD Committee meeting, the school district offered the Tatros no alternatives to the provision of CIC to Amber at school by school personnel, Pl. Exh. 5b, *supra*, I. H. Tr. 69; Tr. 109, Petitioner

since has offered Amber and her family three options, each of which would result in exclusion and segregation of many handicapped children from public school.

First, Petitioner has proposed that the Tatros find and hire a third party to go into the classroom during the day and provide the CIC service to Amber. Pl. Exh. 5b, *supra*, I. H. Tr. 130; Tr. 86-87, 104-111. The expense to the family would not be trivial. Because the times at which the service is needed by Amber might vary somewhat from one day to the next—Pl. Exh. 5b, *supra*, I. H. Tr. 34, 37, 66; Tr. 92—the parents' agent, to be available when needed, might have to remain on call (and thus at parents' expense) throughout much or most of each school day—not just for the five or ten minutes per day needed for the catheterization itself. Both of Amber's parents work during the day, so neither of them could go to Amber's school each day to catheterize her. Pl. Exh. 5b, *supra*, I. H. Tr. 63; Tr. 72-73. (In *Tokarcik*, *supra*, a member of the child's family had to go to school each day to provide the service. 665 F.2d 445.) Another mother proposed by the school district as one who could do the job in fact was not available. Tr. 86-87. The Tatros' high school age son had no means of getting from his school to Amber's each day. Tr. 105. Amber's babysitter was not willing to go to school to do the job. Tr. 104-105, 110-111. And the cost of a visiting nurse was prohibitive ($33 per visit, twice a day). Tr. 106.

Even if, in fact, the Tatros were able to find and afford someone to provide the service, such a requirement still would offend the EHA and Section 504. If administration of CIC must depend upon the parents' ability to find and afford the services of a non-school-district employee, the right of handicapped children such as Amber to be educated in public school will become contingent upon factors having nothing to do with either their legal entitlement to public school education or their ability to benefit from the individualized program in public school (once provided safe access to it). The children of those parents fortunate (and in some cases, persistent) enough to find and employ a private provider of CIC during school hours will be able to attend

public school with "normal" children. Those not so fortunate will be excluded.

Congress, however, clearly mandated by its passage of the Education of the Handicapped Act that the right of handicapped children to be educated in the public schools was no longer to be dependent upon the parents' ability privately to accommodate the child's handicap-related access needs. Congress expressly identified, as one of the evils the EHA was enacted to correct, the following situation:

> [B]ecause of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 U.S.C. § 1400(b)(6). It makes no sense to imagine that Congress would seek to achieve that objective through passage of the Act and at the same time contemplate that parents such as the Tatros would be responsible for such services as CIC. As will be discussed further in section V-C below, CIC is closely analogous to assistance by school personnel for children who, due to their handicaps, cannnot eat independently, or cannot toilet independently, or cannot dress independently. Surely, the EHA and Section 504 would not sanction the requirement that parents be responsible for sending a person at their expense to school, to spoon feed their child, to help their child to the bathroom, or to help their child take off and put on her coat.[12]

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[12] In one of the earliest cases arising under the EHA and Section 504, the school district offered a spina bifida child of normal intelligence three options: (1) "homebound instruction," (2) placement in a segregated school for the handicapped only, or (3) "that the child could be enrolled at [a regular public school] if her mother would go to school two or three times a day to attend to the child." The court found all three alternatives unacceptable. The child's mother in fact was unable to go to school during the day. "The requirement of the plaintiff mother's intermittent presence at [the] School as a condition to her child's being permitted to attend [regular public] school, coupled with the impossibility of this request upon the plaintiff [mother] constituted an exclusion of the plaintiff child from [public] School. Further, even if the mother's presence were circumstantially feasible, the right of the child to attend school cannot be legally

The second alternative for Amber, if CIC is withheld from her by the school district, is to be placed in a separate school for the handicapped, at Petitioner's expense. 703 F.2d 829; *cf. Tokarcik*, *supra*, at 665 F.2d 446. Petitioner's chief expert witness, the school district's medical consultant and former school board trustee, testified:

> Well, of course, the obvious [alternative] would be a contracting basis. That she would be contracted out to some other agency, that was able to handle this [CIC] function.

Pl. Exh. 5b, *supra*, I. H. Tr. 128. In its Brief, Petitioner declares that because of Amber's inability to attend public school safely without CIC, "an alternative placement must be selected." Pet. Brief at 33. In that event, Petitioner would be responsible for the cost of such a placement (except for the negligible cost of the CIC, if Petitioner's other arguments prevail). 20 U.S.C. § 1413(a)(4); 34 C.F.R. §§ 104.33(b)(3), 300.302. The willingness of Petitioner even to suggest the second option, necessarily implying a contract placement in a private school for the handicapped, belies its putative concern with cost and "undue burden." The fact is that the Tatros have not been able to find a non-public school for the handicapped in the Dallas area for which Amber (who is neither mentally retarded nor emotionally disturbed) would be eligible. Tr. 72. If a school could be found anywhere at all, it likely would be so far from home as to require residential placement. Ironically, *Amicus* National School Board Association has complained extensively about the high cost of residential and other contract placements of handicapped students.[13]

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conditioned upon the mother's presence at school." *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976) at 182-183.

[13] "In general, non-residential [non-public] placement doubles the cost of educating a handicapped pupil. Residential placements cost about four times as much as educating in the school district or if placed in relation to the cost of educating a non-handicapped student, it cost eight times as much to educate a handicapped student in a residential setting as a non-handicapped student in a school district." NATIONAL SCHOOL BOARDS ASSOCIATION, A SURVEY OF SPECIAL EDUCATION

Petitioner's third option is for Amber to be educated at home—what Texas Education Agency rules refer to as "homebound" placement, in which instructional and related service personnel would go to the Tatro residence to serve Amber there. 19 Tex. Adm. Code § 89.242(b)(6); Pl. Exh. 5b, *supra*, I. H. Tr. 128; 703 F.2d 829; *Tokarcik*, *supra*, at 665 F.2d 446. The third alternative, like the second, also is not cost-effective. Petitioner has agreed in the IEP that an appropriate education for Amber requires the services of a teacher, a physical therapist, an occupational therapist, and a speech therapist. To enable Amber to receive via a "homebound" program the amount of educational benefit intended by her IEP—much less the seven hours per day promised to her by state law and regulation, TEX. EDUC. CODE § 21.004, 19 T.A.C. § 89.235(d)—it would be necessary for Petitioner to divert at least four valuable professionals from availability to other children, for several hours a week, to work one-to-one with Amber. Such an allocation of personnel resources does not square well with *Amicus* NSBA's professed concern about the public school's dearth of qualified personnel needed to comply with the EHA. NSBA Brief at 31-34. And it would deprive Amber of the many educational benefits of integration with non-handicapped children.

The second alternative—contract placement—would segregate Amber from her non-handicapped peers (in age and intellect), while the third course—homebound placement—would isolate her from other children altogether. Beyond their costliness and of more importance legally, all three options violate the EHA's "mainstreaming preference," *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982) at 3049. A major purpose behind the passage of both Section 504 and the amended EHA was to insure maximum feasible access to and participation in regular public school classes by handicapped children.

> The time has come when we can no longer tolerate the invisibility of the handicapped in America. I am talk-

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COSTS IN LOCAL SCHOOL DISTRICTS (1979) at 26 (attached as an Appendix to the *amicus curiae* brief of the Texas Association of School Boards before the Court of Appeals).

ing about over 1 million American children who are excluded from school. . . . [T]oo often we keep children, whom we regard as "different" or a "disturbing influence," out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. . . . Where is the cost effectiveness in consigning them to . . . "terminal" care in an institution? . . . Every child—gifted, normal, and handicapped—has a fundamental right to educational opportunity. . . . But more than 1 million children are denied entry into public schools, even to participate in special classes. . . . We do not even have adequate statistical information on the great number of *physically handicapped children who have the mental ability to attend school but are denied that right.* The variety of explanations for this denial include problems of transportation and architectural barriers. But *the injustice of exclusion remains.*

118 Cong. Rec. 525 (January 20, 1972, remarks of Sen. Humphrey, principal author of the bill which ultimately became Section 504) (emphasis added).

> For far too long handicapped children have been denied access to the regular school system because of an inability to climb the steps to the schoolhouse door, and not for any other reason. This has led to segregated classes for those children with physical handicaps. This is an isolation that in many cases is unnecessary.

121 Cong. Rec. 19483, 19484 (June 18, 1975, remarks of Sen. Stafford—one of the principal co-authors of the bill that was enacted as the Education For All Handicapped Children Act, as well as the ranking minority member of the committee which drafted the legislation).

> Lastly, I would like to mention the concept of mainstreaming children, that is, the placing of handicapped children in the least restrictive environment. . . . I do not believe the burden of proof should be upon that administrator or teacher who seeks to permit the handi-

> capped child to remain in a normal classroom with his peers. Rather, I believe the burden of proof in terms of effectiveness of a program ought to rest with that administrator or teacher who seeks to remove a child from a normal classroom, to segregate him or her from non-handicapped children.

Id. at 25539, 25540 (Rep. Miller). See also *id.* at 19503 (Sen. Cranston), 19505 (Sen. Humphrey), 23709 (Rep. Biaggi), 37026 (Rep. Quie), 37030 (Rep. Daniels), 37412 (Sen. Stafford), 37419 (Sen. Cranston). The Congressional purpose is echoed in federal court decisions interpreting the EHA. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) at 1063, *cert. denied sub nom. Cincinnati City School Dist. Bd. of Educ. v. Roncker*, ____ U.S. ____, 52 U.S.L.W. 3266 (No. 82-1890, October 3, 1983); *Springdale School Dist. v. Grace*, 693 F.2d 41 (8th Cir. 1982) at 43, *cert. denied* ____ U.S. ____, 103 S.Ct. 2086 (1983); *Tokarcik v. Forest Hills School Dist.*, *supra*, at 665 F.2d 455; *Campbell v. Talledega County Bd. of Educ.*, 518 F.Supp. 47 (N.D. Ala. 1981) at 55; *Espino v. Besteiro*, 520 F.Supp. 905 (S.D. Tex. 1981) at 911-913, *denial of planitiffs' attorneys' fees rev. and rem.* 708 F.2d 1002 (5th Cir. 1983).

It follows from the foregoing that children such as Amber Tatro should not be excluded or segregated from the regular public school program without the most compelling of educational justifications. Yet, clearly, the denial of the simple service of CIC will have precisely the exclusionary, segregating effect which Congress sought through Section 504 and the EHA to preclude. Not only would that result be detrimental to Amber's education, but (ironically) it would increase the financial burden of the public school system.

II. CLEAN INTERMITTENT CATHERIZATION IS A RELATED SERVICE WITHIN THE MEANING OF THE EDUCATION OF THE HANDICAPPED ACT.

A. Clean intermittent catherization is needed to assist Amber Tatro to benefit from special education.

The Education of the Handicapped Act is a program of cooperative federalism designed to assist states and local

school districts in providing education programs to handicapped children. A state which elects to receive money under the EHA must provide to each of its school-aged handicapped children, *inter alia*, a "free appropriate public education." 20 U.S.C. § 1412(1). Local educational agencies, such as Petitioner, have parallel obligations. 20 U.S.C. § 1414(a)(1)(C)(ii). A "free appropriate public education" is defined in pertinent part as "special education and related services." § 1401(18). Each of these terms is then further defined. Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child," § 1401(16), while related services are:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a handicapped child to benefit from special education*, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17) (emphasis added).

The District Court and the Court of Appeals below held that, for Amber, CIC is a valid related service which the Petitioner must provide so that she can attend school and benefit from the special education program offered there. The District and Circuit Courts in the instant case and in *Tokarcik v. Forest Hills School District*, *supra*, found as a fact that, due to factors relating to the handicap, a spina bifida child such as Amber cannot safely attend and participate in the educational program offered in a public school classroom without the provision of CIC. Wherever she happens to be placed for her education, Amber, because of her handicap, cannot safely remain through the school day and partake of the instruction presented during that time without receiving CIC at least once and usually twice. A special education program which Amber cannot be present to receive cannot be of any "benefit" to her. "Quite simply put, without the

provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." *Tatro I, supra*, at 625 F.2d 562.

In *Board of Education v. Rowley, supra*, this Court concluded that the purpose and intent of the EHA is first "to make public education available to handicapped children" and next "to make such access [to public education] meaningful." *Id.* at 3037. Consequently:

> The statutory definition of "free appropriate public education," in addition to requiring that the State provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a child *to benefit* from special education." § 1401(17) (emphasis added).

Id. at 3048 (emphasis supplied in the opinion). See also *id.* at 3041, 3042, 3046, 3049.

Clearly, for a child such as Amber, questions of "access" and "placement" cannot be arbitrarily distinguished from "benefit," as suggested by *Amicus* NSBA on its Brief at 20-21. Amber cannot benefit from a program to which she does not have meaningful (safe) access. A "related service," as stressed by this Court in the references above, is one which is needed to assist the child to *benefit* from special education. The above-cited passages also emphasize "educational benefit" as the determining factor for an "appropriate education." In that same opinion, this Court further recognized that "appropriateness" (i.e., educational benefit) often is linked to placement. To the statement that "an 'appropriate education' is provided when personalized educational services are provided," the decision attached a footnote explaining:

> The use of "appropriate" in the language of the Act, although by no means definitive, suggests that *Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education.* For example, § 1412(5) requires that handi-

> capped children be educated in classrooms with non-handicapped children "to the maximum extent appropriate." . . . In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school" level. §1401(18)(C).

Id. at 3046 n. 21 (emphasis added). Educationally, for Amber a regular public elementary school is the appropriate setting, suitable for her participation. Educational services would not be appropriately "personalized" for her unless delivered in that setting.

As the discussion in Part I, *supra*, makes clear, Congress and a majority of courts addressing the question have recognized that the "benefits" of specialized instruction in a public school setting include not only the instruction itself but the benefits of the least restrictive environment. For those handicapped children educationally able to benefit from the instruction therein, placement in an integrated public school environment offers the benefits of, *inter alia*, interaction with non-handicapped children, role models for socially appropriate behavior, and avoidance of the stigma associated with separate special placement. These benefits contribute substantially to the handicapped child's future independence and productivity in society (within the limits otherwise imposed by his/her handicap), which was recognized by this court as an important aspect of "educational benefit." *Board of Education v. Rowley*, *supra*, at 3048 n. 23, and legislative history recited therein.[14]

It follows from the foregoing that for a child who is intellectually and emotionally capable of being educated in or near the "mainstream," specialized instruction which is offered in a setting other than a regular public school classroom

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[14] In addition to the passages cited in *Rowley*, *supra*, see also 121 Cong. Rec. 19494 (June 18, 1975, remarks of Sen. Javits), 19504 (Sen. Mondale), 19505 (Sen. Beal), 23702, 23703 (July 21, Rep. Brademas), 23709 (Reps. Biaggi, Minish), 25538, 25539 (July 29, Rep. Harris), 37411 (November 19, Sen. Humphrey), 37417 (Sen. Javits), 37418 (Sen. Biden), 37419 (Sen. Beall).

would deprive the child of important educational benefits. Thus, for a child such as Amber, specialized instruction in a segregated setting does not confer the benefit of the very same instruction in an integrated environment. In *Roncker v. Walter*, *supra*, and *Springdale School Dist. v. Grace*, *supra*, the Courts of Appeals held that the educational benefits of merely adequate instruction in an integrated public school setting outweigh the benefits of a *superior* academic program in a segregated environment. CIC is needed specifically to permit a child such as Amber to be placed in a regular public school classroom, rather than a separate facility exclusively for the handicapped. Thus, in this further sense, CIC is a service needed by Amber, on account of her handicap, to assist her to benefit from special education—i.e., to "benefit" from the specialized instruction in the sense of being able to receive it in the educationally beneficial integrated classroom, which is the least restrictive environment appropriate to Amber's educational needs and abilities. Specifically regarding spina bifida childen, see *Tokarcik v. Forest Hills School Dist.*, *supra*, at 665 F.2d 455-456; *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976) at 183.

In addition to its related service "access" role, CIC also has special instructional value for Amber. Since 90-95% of spina bifida children learn to self-catheterize eventually—Pl. Exh. 5b, *supra*, I. H. Tr. 20; Tr. 243—and since self-catheterization is obviously an important self-help skill, which will enhance the child's independence in society, learning to self-catheterize is an essential goal of an appropriate education for a child such as Amber. D. Stauffer, *Catheterization—A Health Procedure Schools Must Be Prepared to Provide*, 54 JOURNAL OF SCHOOL HEALTH 37 (1984) at 38. In reality, it is a form of toilet-training (an essential area of instruction for many handicapped children), since for a child with Amber's disability, CIC substitutes for normal voluntary urination. The first IEP developed for Amber in May of 1979 noted her "spina bifida" under "Special Alert" and her inability to toilet herself under "Self-Care Skills." Pl. Exh. 5b, *supra*, I. H. Tr. 135. Amber's current IEP, attached to this Brief as an Appendix, shows that Petitioner

and Respondent have agreed that the ability to self-catheterize is an appropriate educational goal for Amber. *Id.*, Addendum to O.T. Goals, following p. 6. It defies reason to suggest that having Irving school personnel perform CIC with Amber could be in no way related to, nor needed to assist Amber to benefit from, the IEP goal of self-catheterization.[15] CIC thus unquestionably is "required because [it has] a direct relationship to the education of the child . . . as a teaching tool." NSBA Brief at 14.[16]

B. Clean intermittent catheterization is not an excluded "medical service" within the meaning of the Education of the Handicapped Act.

The EHA excludes from the ambit of "related services" any "medical services" other than those "for diagnostic and evaluation purposes." 20 U.S.C. § 1401(17). Consistent with the language and purpose of the EHA, the Court of Appeals below carefully circumscribed the scope of public school responsibility for "life support" services such as CIC—as did the Third Circuit in *Tokarcik*, *supra*—so as to insure that requiring CIC for a child such as Amber would not lead to the inclusion of services Congress did not intend. *Tatro I* at 625 F.2d 562-563; *Tatro II* at 703 F.2d 827-831.

To discern the boundary between included "related services" and excluded "medical services," so as to locate CIC with respect thereto, the Court of Appeals below was guided, first, by the interpretation of the U. S. Department of H.E.W.

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[15] In *Tokarcik v. Forest Hills School District*, *supra*, the District Court was persuaded that assisting Amber to achieve the skill of self-catheterization fit within the federal definition of occupational therapy under the EHA at 34 C.F.R. § 300.13(b)(5): "Improving, developing or restoring functions impaired or lost through illness [or] injury. . . . Improving ability to perform tasks for independent functioning when functions are impaired or lost. . . . Preventing . . . further impairment or loss of function." 3 E.H.L.R. 552:429-430; 665 F.2d 458-459.

[16] Consequently, even if the decision below is held to be erroneous, which Respondents emphatically do not concede, this Court should do no more than remand for further factual findings as to Amber's IEP. However, since the reasoning of the Court of Appeals is correct, further expenditure of scarce judicial resources on this case should not be required.

(now Education), the federal executive department charged with promulgating the regulations to implement and enforce the EHA. 20 U.S.C. § 1417(b). As such, the Office (now Department) of Education's initial interpretation of the statute is entitled to great weight and deference.[17]

The Department defined the term "medical services" as used in the EHA to mean the "services provided by a licensed physician" (permitting only those provided to "determine a child's medically related handicapping conditions which results in the child's need for special education and related services"). 34 C.F.R. § 300.13(b)(4). The Fifth Circuit found this definition to impose an important limitation on the requirement of "life support" services such as CIC as "related services" under the EHA. *Tatro I* at 625 F.2d 562-563. The Third Circuit noted that "the regulations themselves place realistic limitations on the nature of the school services to be provided under the EAHCA," so that "the drastic medical services . . . which the school authorities fear they will by asked to furnish in the future are by definition excluded." *Tokarcik v. Forest Hills School District, supra,* at 665 F.2d 456. Since the direct non-diagnostic/non-evaluative services of the physician, which are excluded, are the most expensive on the continuum of medical costs, this limitation operates to insulate Petitioner and the NSBA, TASB school official *amici* from the largest part of the costs they purport to fear.

A second line between permissible related services and excluded "medical services" was discerned by the Fifth Circuit from the essential purpose of related services, i.e. to assist the handicapped child to benefit from special education. It follows that a "life support" service would not be a "related service" under the EHA if it is not needed by the child in order to be present in the educationally appropriate least restrictive placement throughout the school day. Thus,

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[17] *Lau v. Nichols*, 414 U.S. 563 (1974) at 569-570, cited with approval by the majority opinion in *Guardians Ass'n. v. Civil Service Comm'n*, ___ U.S. ___, 103 S.Ct. 3221 (1983) at 3226-3227; *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Cf. Consolidated Rail Corp. v. La Strange*, ___ U.S. ___, 52 U.S.L.W. 4301 (No. 82-862, February 28, 1984) at 4304.

if the child could safely remain in the educationally appropriate setting throughout the school day without receiving the service, and then receive the service outside of the school setting and school hours, the school district would not be responsible for the procedure as a "related service." *Tatro I* at 625 F.2d 563. This important feature, drawn from the words of the Act itself, serves to remove even more physician-prescribed services from the category of those for which a school district might become responsible under the EHA. Note that Amber's handicap also results in dysfunction of the bowels, requiring periodic enemas. However, since these only are needed twice a week, and can be performed at night, by Mrs. Tatro at home, Respondents do not need to seek this service in order for Amber to be educated in public school. Tr. 97-99.

Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 34 C.F.R. § 300.13(b)(10). *Tatro I* at 625 F.2d 563. The *amicus curiae* brief of the Texas Medical Association and Dallas Medical Society, at the District Court level, attached as an Appendix to Judge Higginbotham's decision, indicated that CIC could be provided "by nurses, school teachers, *or others* . . ." 516 F.Supp. 989 (emphasis added).

> In the case of CIC, the technical aspects of the procedure are not complicated and can be performed successfuly by children on themselves after appropriate training (boys by age 8 and girls by age 10). . . . CIC appears to be a procedure which can be safely performed while neither a physician or nurse is present. CIC can be done safely when a patient or other person is trained to perform it properly and is taught to recognize conditions which should be brought to the physician's attention.

Id. at 990. A service such as CIC which can be performed safely and effectively, with minimal training, by an average lay person, an ordinary parent, or an elementary school age handicapped child, clearly fits within the array of permissible "related services" and is not an excluded "medical service" that must be provided by a licensed physician.

Further analysis shows that CIC could not be an excluded medical service, because it is so closely analogous to other related services which are expressly listed.[18] Even though CIC seems medical in that it requires a physician's prescription, so does fitting a hearing aid,[19] 34 C.F.R. § 300.13(b)(1)(vi), and physical therapy.[20] In fact, Petitioner Irving I.S.D.'s own policies authorize a school nurse to dispense oral medications and administer emergency injections, two procedures requiring physician prescriptions.[21] Pl. Exh. 2 (Tr. 38).

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[18]The list of services in § 1401(17) is illustrative but not exhaustive. 34 C.F.R. § 300.13 *Comment; Tokarcik v. Forest Hills School District*, *supra*, at 665 F.2d 457. As noted above, "related services" are those services which are "required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17). "The term 'special education' means specially designed instruction . . . to meet the *unique needs* of a handicapped child," through an "*individualized* education program." 20 U.S.C. § 1401(16), -(18), -(19) (emphasis added). Congress did not purport to predict all of the special services that would be needed to assist in meeting the unique educational needs of eight million handicapped children on an individual basis. The task would have been staggering and would not have left room for inclusion of future technological innovations which could introduce services not known to Congress in 1975. Thus, it is only reasonable to conclude that Congress sought to describe and illustrate the types of services to be included, rather than to specify every particular service. This Court has described the list in § 1401(17) as "Examples." *Board of Education v. Rowley*, *supra*, at 3041 n. 10. Consequently, the U. S. Department of Education (formerly Health, Education and Welfare) did not abuse its discretion when it expanded the list of "related services" to include "school health services" and when it further commented that even its extended list was "not exhaustive." 34 C.F.R. § 300.13(b)(10) & *Comment*.

[19]For example: D.C. CODE ANN. § 28-4005(a)(9)(B); MINN. STAT. ANN. §§ 145.43, 145.44; WIS. STAT. ANN. § 459-035.

[20]For example: ALA. CODE § 34-24-217; ALASKA STAT. § 08.84.160; ARK. STAT. ANN. § 72-1328(b); D.C. CODE ANN. § 28-4001(4)*(5); GA. CODE ANN. § 43-33-18(1); KAN. STAT. ANN. §§ 65-2901, 65-2914; KY. REV. STAT. § 327-010; ME. REV. STAT. ANN. tit. 32 § 3002; N.H. REV. STAT. ANN. § 328-A:9; N.Y. EDUC. LAW § 6531; OHIO REV. CODE ANN. § 4755.48(F); OR. REV. STAT. § 688.130-140; PA. STAT. ANN. tit. 63 § 1309; VA. CODE §§ 54-273(9), 54-281-2.

[21]*Amicus* Texas Association of School Boards acknowledges in its Brief at 6 that "dispensing medication prescribed by doctors" is among "those services routinely provided by school nurses."

Similarly, CIC seems "medical" in that it must be "supervised" by a physician but it requires no more supervision than does the listed related service of physical therapy. The physician need not be physically present to supervise the service (516 F.Supp. at 975-976, 990); may monitor the service indirectly through examination of the child outside of school hours; and may monitor through periodic reports from the school and/or parents. CIC also appears to promote a medical objective (in addition to its educationally-related benefits) in that it "treats" Amber's neurogenic bladder. But by the same token, physical therapy[22] fulfills a medical treatment goal of preventing atrophy of muscle tissue; audiology might include the goal of prevention of hearing loss, 34 C.F.R. § 300.13(b)(1)(iii), (iv); and counseling services might treat a neurosis or prevent the development of a more acute disorder. 34 C.F.R. § 300.5(b)(8).

Nothing in law, logic, medicine or education decrees that the same service cannot be both medically and educationally beneficial at the same time. A service which performs an education-related function does not become an excluded medical service simply because it happens to play a "medical" role as well.

Finally, because CIC itself obviously does not entail much cost or burden, Petitioner and the school board *amici* have sought to have it excluded not on its own merits but on the

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[22]The former state implementing rule on physical therapy as a related service, on which Petitioner sought to rely in arguments to the Court of Appeals, Petitioner's Reply Brief at 14-17 (5th Cir.), described physical therapy as "the art and science of evaluation, program planning, *and implementation* of physical or corrective conditions resulting from birth, illness, or injury." 19 T.A.C. former § 89.235(a)(3)(C)(x) (emphasis added). The rule went on to describe the therapy as including "therapeutic exercise programs designed to *develop or restore neuro-muscular and/or sensorimotor function, relieve pain, control postural deviations, minimize disabilities*, and to maintain maximal performance levels within the individual's capabilities." *Id.* (emphasis added). The present Texas Education Agency rules make no attempt to elaborate physical therapy beyond the federal regulations' definition of it as "services provided by a qualified physical therapist." 34 C.F.R. § 300.13(b)(7); 19 T.A.C. §§ 89.215(b)(10), 89.217.

basis of other costly and burdensome medical treatment obligations to which they speculate it might lead. Petitioner asserts that the effect of the lower Court's decision would be to obligate public school systems to assume "the massive financial obligations involved in providing *all* medical treatment physicians may unilaterally choose to prescribe for the more than eight (8) million children with handicapping conditions." Pet. Brief at 22 (emphasis added). In keeping with that dramatic misrepresentation, Petitioner and *Amici* NSBA and Texas Association of School Boards offer a "shotgun" barrage of "medical treatments" they allege to be analogous to CIC and thus required by the *Tatro* decisions. These "treatments" are offered either with no discussion at all or with only very superficial comment as how and why they compare with CIC. Pet. Brief at 10; NSBA Brief at 32-33; TASB Brief at 6. Most of the alleged analogs to CIC were mentioned for the first time in briefs after the close of the evidentiary record. Given the simplicity, safety, and inexpensiveness of CIC; its necessity to assist Amber to benefit from special education; and the previously discussed guidelines by the Court of Appeals below, it should not be the burden of Respondents to examine and distinguish each of the "treatments"[23] to which Petitioner and the school

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[23]The absurdity of Petitioner's and the school board *amici*'s attempted analogies is well illustrated by their comparing CIC to kidney dialysis (more accurately, kidney hemodialysis). Petition for Writ of Certiorari at 9; Pet. Brief at 10 n. 3; NSBA Brief at 33. Kidney hemodialysis (in which the body's entire blood supply is drained, cleansed, and returned to the body) cannot be offered at school but must be provided at special dialysis centers, usually staffed by physicians on the premises for close-at-hand monitoring. The procedure takes 5-6 hours each time, up to three times a week. Thus, hemodialysis is not a service needed for access to instruction in a public school class; rather, it necessarily removes the child from school for long periods of time. Hemodialysis includes an extraordinarily high risk of injury and detrimental side effects, and is only employed with children when certain death is the alternative. Hemodialysis is not a skill for independent living which the child can be expected to learn to do for herself eventually. Extraordinarily expensive specialized medical equipment is required for hemodialysis and the personnel who administer the procedure must receive extensive specialized medical training. Many other features serve to distinguish a treatment such as hemodialysis from CIC

board *amici* imagine CIC will lead. Further, Respondents are reluctant to gratuitously concede the inclusion or exclusion of other services prior to other plaintiffs' and defendants' having the chance to make their respective cases. Each service advanced should be examined on its own merits, in light of the criteria previously discussed. Whatever the outcome with respect to other hypothesized procedures, CIC cannot reasonably be excluded for a child such as Amber Tatro.

III. CLEAN INTERMITTENT CATHETERIZATION IS A SUPPLEMENTARY AID OR SERVICE WITHIN THE MEANING OF THE EDUCATION OF THE HANDICAPPED ACT.

In addition to its related service role, clean intermittent catheterization also is required for Amber as a "supplementary aid [or] service." Section 612 of the EHA requires the State to:

> . . . assure that, *to the maximum extent appropriate*, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of *supplementary aids and services* cannot be achieved satisfactorily . . .

20 U.S.C. § 1412(5)(B) (emphasis added). The Act then goes on to make local educational agencies such as Petitioner responsible for:

> . . . *to the maximum extent practicable* and consistent with the provisions of section 1412(5)(B) of this title,

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and to place dialysis clearly outside the range of services contemplated by the EHA and the Court of Appeals decision below. See J. LUCKMAN & R. SORENSEN, MEDICAL-SURGICAL NURSING (1980), a widely used text in nursing schools, as well as A. GUYTON, TEXTBOOK OF MEDICAL PHYSIOLOGY (1980); L. WHALEY & D. WONG, NURSING CARE OF INFANTS AND CHILDREN (1983) at 1146-1152, 1174-1180; and T. Nevins and S. Mayer, *Dialysis*, in S. GELLIS & B. KAGAN (eds.), CURRENT PEDIATRIC THERAPY (1980).

> the provision of *special services to enable such children to participate in regular educational programs* . . .

20 U.S.C. § 1414(a)(1)(C)(iv) (emphasis added). Since Amber is *educationally* equipped to benefit from instruction in regular public school class, then § 1412(5)(B) and its corollary § 1414(a)(1)(C) require Petitioner to offer the special service which will enable Amber to be placed and remain in that environment.

Unlike "isolated" or "scattered" references in the legislative history that were found insufficient by this Court in *Board of Education v. Rowley, supra*, at 3047, 3049 (concerning "maximum potential" and "equal educational opportunity" under the EHA); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) at 411 n. 11 (with respect to "affirmative action" under Section 504); and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) at 20 (regarding equal protection as a basis for 42 U.S.C. § 6010), insistence that school districts extend the special services necessary to integrate handicapped children into regular classes is a consistent theme which runs throughout the legislative history of the EHA, as amended. See the legislative history surveyed in Part I above. Prior to the "related services" requirement, which was added to the EHA by Public Law 94-142, the Education For All Handicapped Children Act of 1975,[24] the "supplementary aids and services" requirement was part of P.L. 93-380, the Education of the Handicapped Amendments of 1974. 20 U.S.C. former § 1413(a)(13)(B). The earliest judicial interpretation of the amended EHA applied the 1974 "supplementary aids and services" requirement to the provision of services necessary to enable a girl disabled by Amber's handicap of spina bifida (including incontinence of the bowels) to attend regular public school classes:

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[24] P.L. 91-230, the original Education of the Handicapped Act of 1971, authorized funding to "initiate, expand, or improve programs and projects . . . which are designed to meet the special educational *and related needs* of handicapped children . . ." 20 U.S.C. former § 1413 (emphasis added).

> This educational fact that handicapped children should be excluded from the regular classroom situation only as a last resort is recognized in federal law. The federal statute providing moneys to states for special education programs mandates that every state have procedures to assure handicapped children are educated with children who are not handicapped and that "removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1413(a)(13)(B).

Hairston v. Drosick, *supra*, at 183-184. Petitioner and the school board *amici* stress that Amber is able to "benefit *educationally*" from the individualized program offered by Petitioner. Pet. Brief at 31-32; NSBA Brief at 7-8; TASB Brief at 11-12. It is precisely because Amber can "benefit *educationally*" from instruction in the regular public school that she should be provided the service which will permit her access to that program in the regular school environment. Amber is entitled to be educated in the least restrictive placement appropriate to her individual *educational* needs and abilities.

> Not only have we guaranteed [handicapped children] a right to education, but I think we have written adequate provisions which will protect those rights and guarantee that *a child will not be* improperly labeled or *placed in an educational setting which will not suit his or her educational needs.*

121 Cong. Rec. 37026 (November 18, 1975, remarks of Rep. Quie) (emphasis added). Petitioner has acknowledged, as it must, that "where a child has average or above-average intelligence, the goal of the school system may be to enable the child to go from one grade to another and graduate with an average level of success," citing *Rowley*, *supra*, at 3049. Pet. Brief at 30. The NSBA *Amicus* Brief stresses the importance Congress assigned to enabling handicapped children to participate in physical education classes and extra-

curricular activities, *id.* at 12-14, options that will be foreclosed to Amber if she must remain at home because CIC is not available at school.

If Amber were not *educationally* capable of benefitting from any program that could be offered in a public school setting, even with supplementary aids and services, then it would be permissible to educate Amber in a non-public segregated (by handicap) setting, such as a residential placement. *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983) at 226-230, relying upon *Board of Education v. Rowley, supra.* Amber's neurogenic bladder does not render her *educationally* incapable of benefitting from instruction in a regular public school setting. In fact, it is agreed that Amber is intellectually and emotionally normal. (Even most mentally and emotionally disabled children are educated in or near the "mainstream.") Rather, Amber's neurogenic bladder renders her *physically* incapable of being educated alongside children who are not handicapped, *without the supplementary aid or service of CIC.* The distinction is significant. To justify placement of Amber outside the regular educational environment, Petitioner must be able to show that Amber needs a type of instruction which can only be offered in a separate facility. Some handicapped children require such separation on account of their unique educational needs. But once it is established that the type of instruction Amber needs is the kind which can be presented in an integrated regular public school environment, Petitioner must make available the ancillary services necessary to enable Amber to receive such instruction in that setting.

IV. THE REQUIREMENT OF CLEAN INTERMITTENT CATHETERIZATION AS A RELATED OR SUPPLEMENTARY SERVICE FOR A HANDICAPPED CHILD SUCH AS AMBER TATRO IS A REASONABLE CONDITION IMPOSED ON PETITIONER FOR THE RECEIPT OF FEDERAL FUNDS UNDER THE EDUCATION OF THE HANDICAPPED ACT.

It is clear from the foregoing sections that because Amber needs CIC in order to avoid exclusion and segregation from

public school, the EHA gives her a right to that service. Nevertheless, Petitioner asserts that:

> Any rights created by § 1415, enforceable against the Petitioner, are limited to a showing Petitioner has violated the "State Plan." This [Respondents] did not attempt to do. Without a finding that the local educational agency has violated the provisions of the "State Plan" as required by § 1413, any "relief may well be limited to enjoining the federal government from providing funds to the [State]."

Pet. Brief at 18, relying on *Pennhurst State School & Hospital v. Halderman*, *supra*. However, this Court has already disposed of the foregoing contention in *Board of Education v. Rowley*, *supra*, which prescribes a two-fold inquiry for judicial review in EHA cases:

> First, has the State complied with the procedures set forth in the Act?[27] And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

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[27]This inquiry will require a court *not only to satisfy itself that the State has adopted the State plan, policies and assurances required by the Act*, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401 (19).

Board of Education v. Rowley, *supra*, at 3051 (emphasis added). Clearly the inquiry under each prong of the *Rowley* test looks beyond the mere question of whether the local district's array of services aligns with the State Plan.[28] Whatever might be contained in the Texas State Plan and whatever might be the political decision of the Department

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[28]The petitioner in *Rowley* argued that since sign language interpreter services were not listed in the New York State Plan, Hendrick Hudson school district was not obligated to provide them. *Board of Education v. Rowley*, *supra*, Pet. Brief, reprinted at 3 E.H.L.R. 553:323 (1982) at 337-349. This Court did not ground its decision on that basis, nor did it exclude sign language interpreter services under every conceivable circumstance in New York.

of Education as to whether to approve the State Plan, a Court still must determine whether the individual program offered Amber is reasonably calculated to enable her to benefit educationally. For the reasons discussed in Parts I-III, *supra*, that program, taken as a whole, does not, due to its crucial omission of CIC.

Petitioner next argues that if the EHA mandates CIC for Amber, then Congress exceeded its authority under this Court's reasoning in *Pennhurst State School & Hospital v. Halderman*, *supra*. In that decision, this Court held that:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly accepts the terms* of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions *or is unable to ascertain* what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (emphasis added, citations omitted). A comparison of the EHA with the statute examined in *Pennhurst*, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (the "DD Act"), will show that the State of Texas, and, through it, its political subdivisions such as Petitioner, voluntarily and knowingly accepted the terms of the EHA, which unambiguously imposed conditions from which the State reasonably could ascertain an obligation such as CIC for a child such as Amber.

To be more precise, the *Pennhurst* case dealt with one section of the DD Act, § 6010. This Court concluded that § 6010 did not confer on plaintiffs any substantive rights whereby they could compel the State of Pennsylvania to undertake the costly and burdensome task of upgrading its public in-

stitutions for the mentally retarded and substituting one mode of treatment (small community-based group homes) for that state's present method of services through large isolated institutions. *First*, this Court found that section 6010 did not by its terms impose conditions for the receipt of federal funds under the DD Act. The Court stressed that whereas §§ 6005, 6009, 6011, 6012, 6063 and 6067 of the DD Act clearly state "conditions" which a state must meet in order to receive funding under the Act, § 6010 is expressed in terms of Congressional "findings." *Pennhurst*, *supra*, at 13-14, 22-23. By contrast, 20 U.S.C. §§ 1412-1415 clearly state conditions for the receipt of federal funds under the EHA as amended. A state could not ascertain from the language of § 6010 that the rights enumerated therein were enforceable conditions for that state's receipt of DD Act funding. However, a state could have no doubt that the requirements of EHA §§ 612-615, 20 U.S.C. § 1412-1415, were conditions of EHA Part B funding. Thus Congress spoke with a clear voice, unambiguously imposing conditions for the grant of EHA moneys.

Second, this Court judged the Act's requirements, and the specificity thereof, in relation to the amount of money appropriated by Congress to implement the legislation and the burden and expense of the requirements to be imposed. The Court noted that under the DD Act, Pennsylvania received only $1.6 million in 1976. "When Congress does impose affirmative obligations, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, *supra*, at 24. By contrast, the federal government spends over a billion dollars per year under the EHA as amended. Texas' share alone of the Fiscal Year 1984 EHA Part B appropriation ($67.6 million) exceeds DD Act funding for the entire nation ($62.1 million). P.L. 98-139. In comparing the EHA to the DD Act in light of the *Pennhurst* decision, it must be remembered that while the *Pennhurst* plaintiffs sought a massive, costly systemic overhaul, Respondents herein seek only a service of minimal cost and burden, if any.

Finally, the State could ascertain from the Act as a whole, in context, what might be expected of it. By listing such ser-

vices as physical therapy, audiology, psychological services, etc. in § 1401(17). Congress gave fair notice to the states that the EHA would require school districts to provide types of services not traditionally offered in the public schools. By emphasizing "individualized" services to meet each handicapped child's "unique needs," § 1401(16)-(19), Congress indicated that the list of services in subsection (17) was not—indeed, could not be—exhaustive. Any doubt as to that point should have vanished when the implementing federal regulations expanded the illustrative list and expressly declared that even the expanded list was not exhaustive. 34 C.F.R. § 300.13 and *Comment*. From all the foregoing, it is clearly ascertainable from the EHA, and thus Texas voluntarily and knowingly accepted as terms of its "contract," that a child such as Amber Tatro would be entitled to a physician-prescribed supportive service which, though not specified by name in the Act, is needed to enable her to attend public school and participate without undue risk to her health in the regular educational environment.

V. CLEAN INTERMITTENT CATHETERIZATION IS A REASONABLE ACCOMMODATION PURSUANT TO SECTION 504 OF THE REHABILITATION ACT.

A. Section 504 of the Rehabilitation Act is applicable to the instant case.

Section 504 of the Rehabilitation Act of 1973, as amended, requires in relevant part that:

> No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794. The question of whether handicapped plaintiffs have a private right of action to enforce Section 504 (Pet. Brief at 38) was disposed of by this Court in *Consolidated Rail Corp. v. LaStrange, supra. Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (recognizing a private right of

action under the analogous Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681 *et seq.*); *Guardians Ass'n v. Civil Service Comm'n*, *supra*, at 3227-3228 (private right of action under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d).

As to the assertion that the EHA "preempts" Section 504 in this case (Pet. Brief at 37-38), this Court has granted *certiorari* on the principal decision relied upon by Petitioner for that proposition. *Smith v. Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983), *cert. granted sub nom. Smith v. Robinson*, ____ U.S. ____, 52 U.S.L.W. 3342 (No. 82-2120, October 31, 1983). Thus, the Court probably will resolve the pre-emption question prior to deciding the instant case. Respondents will not presume to add here to the arguments already presented to the Court in *Smith*, *supra*, as to why the EHA does not pre-empt Section 504—especially since the analysis in other sections of this Brief is necessarily lengthy. Instead, Respondents respectfully commend to the Court the arguments and authorities presented in the *Smith v. Robinson* Brief of Petitioners and Brief of *Amici Curiae* Association for Retarded Citizens, Advocacy, Inc., *et al.* *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) at 459-460, and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) at 47-49 (42 U.S.C. § 2000e does not pre-empt 42 U.S.C. § 1981 with respect to employment discrimination); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968) (42 U.S.C. § 3601 *et seq.* does not pre-empt 42 U.S.C. § 1982 with regard to housing discrimination).

It is the position of Respondents that Section 504 is applicable to the present case and that Petitioner has violated that statute. Respondents have established a violation of Amber's rights under the foregoing statute by showing that (1) Amber is an "otherwise qualified handicapped individual" with respect to Petitioner's public school program; (2) the public school program to which Amber seeks continued access is a program receiving federal financial assistance; and (3) Amber has been excluded from participation in, denied the benefits of, and subjected to discrimination by Petitioner's public school program (and would be again if Peti-

tioner prevails) solely on the basis of her handicap.[26] The District Court below found as a fact, which the Court of Appeals affirmed, that the public educational program in question receives federal financial assistance. 516 F.Supp. 977 n. 17; Pet. App. 60a-61a; 703 F.2d 832. The District Court cannot be said to have so clearly abused its discretion as to be held clearly erroneous. Rule 52(a), Fed. R. Civ. Pro.; *United States v. Gypsum Co.*, 333 U.S. 364 (1948) at 395. Consequently, the inquiry next turns to the remaining elements of a Section 504 violation.

B. Amber Tatro is otherwise qualified to receive a free appropriate public education in the least restrictive environment.

In *Southeastern Community College v. Davis*, *supra*, this Court illuminated the parameters of the term "otherwise qualified" as used in Section 504. In that decision, the Court held that Francis Davis, a deaf applicant, was not "otherwise qualified" for admission to a college's professional nurse training program. *Id.* at 414. Two critical distinctions between that case and the instant one must be examined in order to determine the application of *Davis* to Amber Tatro.

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[26]The U. S. Department of Education Office of Civil Rights (OCR), the executive agency charged with administrative enforcement of Section 504, found in September of 1979 that Petitioner had violated Amber's rights under Section 504 by withholding CIC. Pl. Exh. 3 (Tr. 42). That ruling was in line with the consistent position of OCR. *North Kansas City (Mo.) School District*, 3 E.H.L.R. 257:04 (November 29, 1978). *Cf. Consolidated Rail Corp. v. LaStrange*, *supra*, at 4304 (the Department of HEW § 504 regulations "particularly merit deference") & n. 15 ("In adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute"). Those incorporated regulations require Petitioner to provide "related aids and services that (i) are designed to meet individual educational needs ofhandicapped persons as adequately as the needs of non-handicapped persons are met;" to "provide for the education of each qualified handicapped person . . . with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person;" and to "place a handicapped person in the regular educational environment . . . unless it is demonstrated . . . that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §§ 104.33(b)(1), 104.34.

To be a "qualified handicapped person" under U.S. Department of Education regulations governing post-secondary educational and vocational programs, the applicant must "meet[ ] the academic and technical standards requisite to admission or participation in the recipient's education program . . ." 34 C.F.R. § 104.3(k)(3), cited with approval in *Davis, supra*, at 406 (previously codified as 45 C.F.R. § 84.3(k)(3)). By contrast, to be "otherwise qualified" for purposes of a public pre-school, elementary, or secondary program, the handicapped child need only be within the proper age range.[17] 34 C.F.R. § 104.3(k)(2).

In the *Davis* case, this Court found as a fact that, due to her deafness, Francis Davis could not be trained to perform some of the essential elements of nursing. *Southeastern Community College v. Davis, supra*, at 401-404, 409-410, 413. Thus, she could not meet the academic/technical requirements for participation in the professional nurse training program (which ultimately amount to the ability to be trained to serve as a professional nurse). Amber Tatro, by contrast, is not required to meet any academic or technical standards in order to be otherwise qualified for a free appropriate public education. It is sufficient that she is a handicapped child between the ages of 3 and 21 inclusive and a legal resident of the Irving Independent School District. Southeastern Community College was not required to undertake "affirmative action" in order to prevent the exclusion of a handicapped applicant not otherwise qualified; nor was it compelled to fundamentally alter its program in order to render it one for which the not otherwise qualified handicapped person could qualify. Since Amber meets the essential elements of eligibility—no academic/technical requirements can render her not "otherwise qualified" for a free appropriate public education at the pre-school/elementary/secondary level—Amber has the right to ask for more in the way of accommodation, to insure that she is not denied benefits and excluded from participation, than did Francis Davis at the post-secondary level.

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[17] Further, the child must reside "in the recipient's jurisdiction." 34 C.F.R. § 104.33(a) and Appendix A *Comment* 23.

A second distinction, found persuasive by the Fifth, Tenth, and Eleventh Circuits, leads to the same result. As previously noted, in *Southeastern Community College v. Davis, supra*, this Court accepted the lower court's factual finding that Ms. Davis' deafness would prevent her from ever being able to perform certain essential tasks of nursing. Thus, even with reasonable accommodations, Ms. Davis still could not realize the principal benefit of the program to which she sought access—i.e., to be trained to fulfill the role of professional nurse. *Id.* at 401-402, 409-410. By contrast, in the instant case, the simple modification necessary to enable Amber's safe participation (CIC) would not prevent her from realizing the benefits of specialized instruction in public school. *Tatro I, supra*, at 564; *Tatro II, supra*, at 832. *Accord New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982) at 853-854; *Georgia Ass'n for Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983) at 1580. *Cf. Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982) at 1201-1202 n. 36. Petitioner has acknowledged that Amber is *educationally* capable of benefitting from the instruction offered in its public school program. Assuming that the program offered Amber is otherwise appropriate by this analysis, but for the contested omission of CIC, the question of whether Amber could benefit from that program if given access to it is foreclosed. Amber thus is presumptively an otherwise qualified handicapped individual.

C. Petitioner's refusal of clean intermittent catheterization to Amber Tatro would have the effect of excluding her from participation in, denying her the benefits of, and subjecting her to discrimination by, Petitioner's program solely on the basis of her handicap.

To be permitted access to Petitioner's program, Amber requires a small accommodation of her bodily elimination needs. A more reasonable accommodation for a handicapped person hardly could be imagined than CIC. It takes only a few minutes twice a day, can be provided safely and easily, does not entail costly or elaborate equipment, and requires neither highly specialized credentials nor extraordinary training for the person providing the service. This

Court held in *Southeastern Community College v. Davis*, *supra*:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. *Technological advances can be expected to enhance opportunities to rehabilitate the handicapped* or otherwise to qualify them for some useful employment. *Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.* Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. *Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.*

Id. at 412-413 (emphasis added). As discussed in the Statement of the Case, *supra*, CIC represents a technological advance which replaced the expensive and burdensome sterile catheteriation and which allows the needs of handicapped children such as Amber to be accommodated without undue financial and administrative burdens on either the State of Texas or Petitioner. In the exercise of its continuing important responsibility, the Office for Civil Rights of the Department of HEW and of its successor Department of Education has consistently identified the refusal to provide CIC as an instance of discrimination under Section 504. See footnotes 26, *supra* and 28, *infra*.

Prior to the passage of Section 504 and the 1975 EHA amendments, many school systems across the nation, on the basis of state law or local practice, excluded non-toilet-trained handicapped children from their free public schools. A. Abeson, *et al.*, *Access to Opportunity*, in 2 HOBBS (ed.),

ISSUES IN THE CLASSIFICATION OF CHILDREN 270 (1975) at 272. Since the enactment of Section 504 and the EHA, that exclusion has been discontinued. Obviously, states have been willing to assume that a handicapped child must not be excluded from participation in or denied the benefits of the public schools solely on the basis of her handicap-related inability to toilet appropriately. Consequently, it should come as no surprise now to find public school personnel assisting handicapped children with their toileting needs, including physically placing a child on and removing her from the commode.[28] A child reasonably cannot be expected to remain in school through a six-to-eight hour school day without relieving her bladder or bowels. If, due to physical or mental disability, the child is unable to perform this natural function independently, a reasonable accommodation, in order that her education might proceed, is for school personnel to assist the child. Due to her orthopedic/other-health-impairment, Amber Tatro is unable to empty her bladder independently. A reasonable accommodation, so that Amber may remain in the most integrated setting in which she is educationally capable of benefitting, is for school personnel to assist twice a day through CIC to drain her bladder. If the Court of Appeals decision in this case is reversed, the clock may be turned back to the time when public school systems could exclude children who, solely on account of their handicaps, lacked independent toileting skills.

Similarly, a child cannot be expected to attend school all day without eating. Some handicapped children, although able to benefit educationally from instruction (standardized or personalized) in public school, are unable, due to a physical or mental handicap, to eat independently. Such children re-

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[28] In a recent decision, the U. S. Department of Education's Office of Civil Rights found a school district in non-compliance with Section 504 for "[f]ailing to provide related aids and services . . . necessary for [the child] to receive an appropriate education," because the district failed to implement a two-hour restroom schedule to accommodate the child's handicap-related bladder problems. *Kansas City U.S.D. # 50*, OCR Ref. No. 07831094, reprinted at E.H.L.R. Curr. Dec. 257:455 (May 2, 1983).

quire the reasonable accommodation of being spoon fed by school personnel. Some handicapped children, although able to benefit educationally from instruction in public school, are unable, for example due to paralysis of the hands and arms, to dress and undress. Such a child could not be expected to remain in school throughout the school day without removing and putting back on items of clothing, such as coat and hat, and may need reasonable accommodation in the form of assistance from school personnel in taking off and putting on their coats, hats, etc.

All of the foregoing examples have legally relevant aspects in common with CIC for Amber. CIC is comparable to the accommodations discussed above in terms of cost, risk, and physical involvement. In each case, including CIC, a child educationally capable of benefitting from instruction in public school would be excluded from participation in and denied the benefits of the public school program without the service as a reasonable accommodation.

A key benefit of the educational program offered to non-handicapped eight-year-olds is second-grade-level academic and other instruction[29] in a regular second grade class in a regular public elementary school. However, without the accommodation of CIC, Amber's educational program would have to be offered to her in a setting outside the public school system. (See discussion in Part I above.) This significant deviation in no way renders the program *educationally* appropriate. *Educationally*, instruction in a regular public school classroom is appropriate for Amber. It is suited to her unique *educational* needs and abilities, and benefits her educationally. Consequently, Petitioner cannot legally justify the substantial departure from the norm which it proposes for Amber's educational program—i.e., instruction outside the

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[29]Amber's instructional program has had to be supplemented by physical, occupational, and speech therapy, and modified somewhat to compensate for learning difficulties secondary to the neurological damage of spina bifida, in order to be educationally appropriate. In all other respects, it is a regular second grade curriculum. See the IEP attached as an Appendix hereto.

public school. The basis for the deviation is not educational. Amber's age and residence qualify her for a free appropriate public education in the least restrictive environment appropriate to her *educational* needs and abilities. In the absence of CIC, Amber's "need" for separation from the public school mainstream arises not from her *educational* needs and abilities (as, for example, in the case of *Abrahamson v. Hershman, supra*) but solely from Petitioner's refusal to accommodate her handicap. "The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is in violation of . . . 29 U.S.C. § 794." *Hairston v. Drosick, supra*, at 184.

Clearly then, Petitioner has discriminated against an otherwise qualified handicapped individual solely on the basis of her handicap—by withholding from Amber the reasonable accommodation she needs, solely on account of her handicap, in order to participate in and benefit from the educational program for which she is otherwise qualified. In yet one other respect, Petitioner has discriminated against Amber under classical discrimination analysis. Petitioner makes available to non-handicapped regular students the services of its school nurses, to administer physician-prescribed medications, orally or in emergencies by injection. Pl. Exh. 2, *supra*. Throughout the public school systems, school nurses routinely dispense medications prescribed by medical doctors. Brief for *Amicus* TASB at 6. School nurses also provide first aid. *Id.* Thus, Petitioner makes available to students who do not have Amber's unique handicap those physician-prescribed services which are within the competence of a school nurse and which are needed by the children in order to attend school safely throughout the school day. However, Petitioner seeks to withhold from Amber the simple physician-prescribed service of CIC, which is well within the competence of a school nurse and which is needed by Amber, solely on the basis of her handicap, to attend public school safely through the school day.

D. Clean intermittent catherization for Amber Tatro does not impose an undue burden on Petitioner.

In *Southeastern Community College v. Davis, supra*, this Court identified two forms of "undue burden" which would relieve a recipient of responsibility for accommodating a handicapped person: "fundamental alteration in the nature of a program" and undue financial and administrative costs. *Id.* at 410, 412. To accommodate Francis Davis, the college nursing training program would have had to eliminate practical training in those essential tasks of nursing which Ms. Davis could never perform (and thus never demonstrate competency in) due to her handicap. Consequently, the recipient could not accommodate the handicapped plaintiff without rendering its program in essence something other than a professional nursing training program. "It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered." *Id.* at 413. By contrast, Amber does not seek the removal of any requirement which is relevant to her eligibility to receive a free appropriate public education. The *de facto* "requirement" that she be able to remain in class all day without catheterization has *nothing* to do with her age, legal residence, or *educational* needs and abilities. Independent toileting skill is not a criterion for public school eligibility and the lack of it does not "otherwise disqualify" Amber, whereas the requirements imposed on Francis Davis had very much to do with her academic/technical qualifications for admission to a post-secondary educational program.

Further, and more important, the addition of CIC to the total array of services offered by Irving I.S.D. to meet the unique needs of its handicapped students will not transform that school district into something it is not already. Petitioner already is, as it is required by the EHA to be, an agency which offers the physician-prescribed and physician-monitored services of physical therapy, audiology, and school health services. It is already a system which includes the medically-related (though not strictly "medical" within the meaning of the EHA) services of occupational therapy, speech pathology, psychological counseling, and social work services. It is ludicrous to imagine that the addition of CIC tips the scales to Petitioner's becoming a public health

system.[10] Requiring Petitioner to provide the simple, inexpensive, and safe accommodation of CIC does not legally or logically obligate Petitioner in the future to offer such elaborate medical treatment as kidney dialysis to some other child as a "reasonable accommodation." The same factors discussed in section II-B above, which propel kidney dialysis and other falsely analogized treatments outside the scope of "related services," would also serve to preclude such treatment as a "reasonable accommodation."

By use of the qualifier "undue," this Court signalled in *Davis* that not every financial and/or administrative burden is impermissible in order to accommodate a handicapped person. Consequently, the question of "undue burden" is a factual determination, which the trial court obviously resolved in Respondents' favor in the instant case. In *Davis*, the burden was found to be "undue" because even after extensive modifications in order to render the program one for which Ms. Davis could qualify despite her handicap, Ms. Davis still could not realize the intended benefit of the program. By contrast, Amber, who is already otherwise qualified, could realize the intended benefit of a public school education if provided reasonable accommodation to permit her access to it. The intended benefit of a handicapped elementary school student's special education program differs significantly from the intended benefit of a post-secondary professional training program. The intended benefit of the latter is to achieve a particular result—i.e., to be trained to perform the essential tasks of the profession in question. *Southeastern Community College v. Davis*, *supra*, at 413. However, as this Court has observed, the intended benefit of a free appropriate public education at the

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[10] For handicapped and non-handicapped children alike, the public schools perform the incidental role of "public babysitter" or "day care" program, enabling both parents to be employed full time. The fact that the public school system happens to perform this secondary function does not convert it from a primarily educational to primarily custodial system. Comparably, the fact that a reasonable accommodation such as CIC, to enable a handicapped child such as Amber to be educated in public school, also serves a health-related purpose, does not transform the school district into a health care institution.

pre-school/elementary/secondary level is not necessarily to produce a particular outcome, but simply to enable the child to receive educational benefits. *Board of Education v. Rowley, supra*, at 3043. With the accommodation of CIC to permit Amber to remain safely in the public school classroom, she can benefit educationally from the instruction offered there.

The financial and administrative "costs" of CIC cannot be considered undue. None of the courts examining CIC has been persuaded as a fact that this simple service entails much cost at all. Since the level of training required to administer the service is minimal, a school district need not hire new staff to provide the CIC, unless it chooses to for reasons of its own. The cost in terms of staff time (perhaps ten minutes per school day) is negligible. The amount of time that would have to be spent in consultation with the prescribing physician is well within tolerable limits—no more so than responsible school personnel would spend for children with other medically-related handicap needs, e.g., for physical therapy, audiology, etc. Finally, to the extent that the prescribing/delegating physician provides diagnostic or evaluation services in connection with the child's CIC, the school district would be financially responsible.[31] 20 U.S.C. § 1401(17); 34 C.F.R. § 300.13(b)(4).

Petitioner virtually concedes that CIC itself is not burdensome, by placing such heavy reliance on arguments as to the dire impositions to which upholding CIC might lead. By this reasoning, Amber must be denied the service she needs in order to be able to remain in class through the day, not because serving Amber would burden the district but because someday some other child might ask for something that really is burdensome. However, the legal standards for related (as opposed to purely medical) services and for reasonable accommodation, as thoroughly examined above, provide

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[31]Note than four of the seven physician functions in CIC that are listed in Pet. Brief at 25-26 are diagnostic and evaluative in nature: (1), (4), (5), (7). Respondents have not asked that Petitioner either pay for or hire the physician to perform any of the physician functions.

more than adequate safeguards for the public school system against the future horrors feared by Petitioner.

To create the illusion of cost, Petitioner and the school board *amici* argue that provision of CIC will increase the risk of injury and thus necessitate higher liability insurance premiums for the school district. Two points render this argument invalid. In the first instance, as previously discussed, the record shows that CIC is a very safe procedure, with minimum risk. More importantly, Congress has removed increased risk as a basis for excluding handicapped children from public school. Opening the public schoolhouse doors to previously barred children in wheelchairs, with diminished intelligence, with impaired judgment, with deficient motor coordination, with fragile bodies, with damaged senses, etc., cannot help but increase the overall risk of accident or injury. Nevertheless, the EHA's and Section 504's command is unmistakable: to include *all* handicapped children, in the regular public school environment to the maximum extent such children can benefit educationally therefrom. The focus is on the needs and abilities of the children rather than on school officials' fears of liability. Congress has made the judgment that the benefit to society of appropriately educating handicapped children for independence and productivity outweighs any increased burden on local school systems of serving previously excluded handicapped children.

Conclusion

In consideration of all the foregoing, Respondents respectfully pray that this Court affirm the decision of the U. S. Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

James C. Todd
ADVOCACY, INCORPORATED
1006 East 50th Street
Austin, Texas 78751
(512) 475-5543
Attorney for Respondents

3 Yr. Eval. due: 11/83 Page 1 of 21

IRVING INDEPENDENT SCHOOL DISTRICT
ADMISSION, REVIEW, AND DISMISSAL COMMITTEE SUMMARY

STUDENT Amber Tatro DATE August 26, 1983

D.O.B. 10/9/75 SCHOOL J. Haley PROGRAM Resource

I. The committee reviewed the following data:

A. Assessment reports (specify reports and dates)
___ No additional information provided
__X__ Assessment information presented as documented:
4/10/82, 7/22/82, 3/4/83 Neurosurgery note/Frederick Sklar, M.D.
4/21/83 Report/Scottish Rite Hospital
5/17/83 Examination Report/Everett A. Moody, M.D.

B. Assessment data or information from the parent or student:
___ No additional information provided
__X__ Assessment information presented as documented:
Mrs. Tatro gave a verbal report of Amber's recent progress including visit. Request for information form was signed at this meeting.

C. Assessment data or information from other school personnel:
___ No additional information provided
__X__ Assessment information presented as documented:
Adapted Physical Education Report 8/11/83/C Shaffer
Mr. Brown gave a verbal progress report of Amber's 6th grade year. Mr. Parker gave a verbal progress report of remedial German language.

II. The Committee, after considering all of the above assessment data, decided that the student:
___ did not meet any specific eligibility criteria at this time.
__X__ met the specific eligibility criteria for Orthopedically Handicapped (Handicapping Condition)

SE-83-143

III. The committee decided that this student:
✓ needs special education services because of the handicapping condition(s) cited above.
____ does not need special education services at this time.

The data on which this decision was based include assessment as documented:
Previous medical reports indicating Orthopedic handicap, intellectual assessment indicating need in resource class.

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language. ✓ Yes ____ No

The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:
A. a different cultural lifestyle ✓ Yes ____ No
B. lack of educational opportunities ✓ Yes ____ No
C. lack of achievement from previous education experiences ✓ Yes ____ No

Discussion:
Amber falls within the norm for peers and school population.

V. Annual Review

A. Long-range goals and short-term objectives as indicated by the documented progress of the student are considered ✓ appropriate ____ inappropriate

B. The program placement as it relates to student progress is ✓ appropriate ____ inappropriate

C. The related services, if any, are ✓ appropriate ____ inappropriate

D. Referral for additional assessment is considered ____ necessary ✓ unnecessary

E. A change in the student's program placement is ____ needed ✓ not needed (See deliberations)

F. IEP developed or modified with new goals and objectives. (as appropriate).

INDIVIDUAL EDUCATIONAL PLAN

A. Present competencies (may reference State III assessment data attached)

1. Academic/developmental
Woodcock Johnson Test Scores 5/12/83
Reading - 1.5 grade level
Math - 1.6 " "
Written Language Achievement Test 5/12/83
Spelling - 1.4 "
According to Mrs. Boone, Amber is functioning as an average first grader.

2. Physical
See occupational & physical therapy reports of August, 1983.

3. Behavioral
Amber has a short attention Span. Amber is willing to work in the school setting. Amber gets along well with her peers.

4. Prevocational/vocational (age 14+) N/A due to Amber's age.

B. Instructional and related services goals and objectives:

(Written language goals and objectives of occupational therapist will be a result independently of OT and regarding Amber. See occupational therapy report of August, 1983.)

Goal: Amber will complete Handwriting requirements with 75% accuracy, copying from the chalkboard by 2nd grade paper.

Objective #1: Formation of letters on 2nd grade paper, with 75% accuracy.

Criteria for evaluation: Teacher - made tests, CLASS tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource teacher, occupational therapist

Objective #2: Amber will improve in placement of letters on a given line.

Criteria for evaluation: Teacher - made tests, CLASS tests, etc.
Schedule for evaluation: quarterly
Implementor: resource teacher, occupational therapist

SI-83-144

Goal: Amber will progress toward a mid 2nd grade level in math skills.

Objective #1: Amber will be able to add 2 subtract fractions to eighths with 80% accuracy.

Criteria for evaluation: Teacher made tests, class objectives, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Objective #2: Amber will be able to count amounts of money up to twenty-five cents.

Criteria for evaluation: Teacher made tests, class tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Objective #3: Amber will be able to add and subtract two digit numbers without regrouping.

Criteria for evaluation: Teacher made tests, class tests, etc.
Schedule for evaluation: quarterly
Implementor: Resource Teacher

Goal: See occupational therapists report for suggestions on the appropriate goals and objectives. (August 1983)

Objective #1:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Objective #2:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

IEP SERVICES

C.

Services	Time	Start	End	Modifications
Regular Education				
Regular Second grade	R/S of day	8/30	6/84	Using 2nd grade goals
	@ 324-9th [illegible] day			
Special Education				
Resource w/ Mom transport	15-30 min/day	9/83	8/84	Shorter lessons more
Resource Math	45 min day			individual help
Vocational Education				
IHH does in homemaking	N/A			N/A
Related Services				
✓ Occupational Therapy	[illegible]	8/83	6/84	See IEP
✓ Physical Therapy	45 min 1 time a week			
✓ Adaptive Physical Education	consultation basis	9/83	6/84	See IEP
✓ CIC (See Prescription Dr. [illegible] 7-6-83)	2 times a day	8/83	6/84	N/A
✓ Speech/Language Therapy	Evaluation within a 30 min day			N/A
✓ Transportation				
____ None	N/A	9/83	6/84	
____ Special Ed. Bus				
____ Lift Bus				
✓ Parent Reimbursed				
____ Other				

For visually handicapped, autistic, or contract students, the committee has completed and attached additional IEP requirements. N/A Yes ____ No

For the student in 8th grade or age 14 as of September 1, the committee has completed and attached a graduation plan. N/A Yes ____ No

8-6-81

Dr. John Townley
Irving Independent School District
901 O'Connor Road
Irving, Texas

Re: C.I.C. Instructions for Amber Leigh Tatro
PRESCRIPTION

Dear Sir:

Amber Tatro has been placed on a schedule of Clean Intermittent Catheterization every three to four hours during the waking day. Amber is to be catheterized at the times listed:

6:30 A.M.
9:30 A.M.
12:30 P.M.
3:30 P.M.
6:30 P.M.
9:30 P.M.

If Amber's diaper is wet at the time for the scheduled catheterization, this should be reported to me, Dr. Frosts, or Dr. Goldstein at the Spina Bifida Clinic at the Schottish Rite Hospital as the above schedule may need to be modified.

A qualified school nurse or other qualified person can perform C.I.C. and attached to these instructions are the Scottish Rite Hospital instructions for catheterization of a female which are to be followed.

A # 10 or # 12 catheter should be used to start out.

The above schedule for catheterization and size of catheter may be altered upon the direction of myself, Dr. Frosts, or Dr. Goldstein from time to time according to Amber's needs.

If there are any questions, I, Dr. Frosts, or Dr. Goldstein may be reached through the Spina Bifida Clinic at Scottish Rite Hospital.

M. D.

date

1983 84 school year.

Long-Range

To increase fine motor skills in accordance with school curriculum.

Implementation:

OT/PT/Parent: 1. Client will remove shoes, socks + braces independently - within 5 min.

OT/PT/Parent: 2. Client will put on shoes, socks + braces with minimal assist within 10 min.

OT/Parent: 3. Client will remove and put on shoes + socks within 10 min.

OT/Special Teacher: 4. Client will write letters between lines using appropriate grade level paper 75% accuracy.

OT/Classroom Teacher: 5. Client will use 3 point grasp on pencils and crayons without reminders for correct finger placement.

OT: 6. Coordinate self-catheterization program with nurse, if appropriate. Specific goals to be formulated

For Foley Table Re Cath

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TEXAS SCOTTISH RITE HOSPITAL FOR CRIPPLED CHILDREN

INSTRUCTIONS FOR PARENTS ON CATHETERIZATION OF FEMALE

Purpose:

To completely empty the bladder at scheduled intervals in order to decrease the incidence of urinary tract infection.

Urine that stays stagnant in the bladder is more likely to become infected. A bladder that stays full becomes enlarged and thickened.

Scheduled emptying of the bladder allows the patient to become familiar with the difference in the sensation of a full bladder and an empty bladder.

Equipment Needed:

Clean catheter, metal or rubber. (Metal is best since it can be boiled repeatedly without deterioration.)

Soap and water.

Dish to catch the urine, for example, a re-usable jar.

Large underpad, to prevent soaking bed linens.

General Instructions:

1. Wash hands with soap and water.
2. Get all of the equipment ready.
3. Get child ready. (If possible, put at table height since it is easier to do this procedure at this height.) Place child on her back.
4. Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction. (Never wash in an upward direction since this will move germs from around the rectum up into the area of the bladder opening.)
5. Insert catheter in urethra and let all urine drain out of the bladder. This may take longer than you think, so do not remove catheter until the urine has stopped draining.
6. If you are unable to catheterize, contact your local Public Health Nurse or call Texas Scottish Rite Hospital.
7. Discard urine.
8. Clean catheter. Clean with soap and warm water after each use. Allow to dry and place in a clean, dry envelope.

   At least once a day after the catheter has been washed with soap and water place it in a pot of water and boil for 20 minutes. Allow the catheter to air dry and place it in a clean dry envelope.

8 of 21

OPHTHALMOLOGY CONSULTANTS, P.A.
EVERETT A. MOODY, M.D.
PEDIATRIC OPHTHALMOLOGY AND STRABISMUS
[illegible] A. SHIRLEY, M.D.
GENERAL OPHTHALMOLOGY

DISEASES AND SURGERY OF THE EYE

EXAMINATION REPORT

Patient's Name: Amber Tatro
Date of Examination: 5-17-83

I. Diagnosis: Strabismic amblyopia

II. Treatment:

A. ✓ Glasses
B. _____ Patching
C. _____ Medications
D. _____ Exercises
E. _____ Surgery
F. _____ None

III. Recommendations for school:

A. _____ Front of class placement
B. _____ Needs visual aids
C. _____ Needs special materials
D. _____ Visual restrictions
E. ✓ None of the above
F. _____ Other

IV. Patient is to return: One year

V. Comments: With glasses visual acuity corrected to 20/20+ two eye. Good visual function & coordination noted.

EVERETT A. MOODY, M.D.

[illegible] SUITE 800 [illegible] (214) 750-8888
[illegible] SUITE 210 [illegible] (214) 659-8888

X

7-6-21

TEXAS SCOTTISH E HOSPITAL
FOR CRIPPLED CHILDREN
2222 Welborn
Dallas, Texas
214:521-3168

Report of Clinic Visit/Return

TO: [illegible]

In response to your request, the following information is provided to you as a summary of the patient's last visit.

Patient's Name [illegible] DOB [illegible]

Clinic [illegible] Date [illegible]

Chief Complaint/Diagnosis Status post humerus fx [illegible]

Interval History [illegible] (new referral) [illegible]

Recommendations [illegible]

Return to Clinic [illegible]

[illegible]
Medical Records Department

ADDITIONAL COMMENTS:

MED

TATRO, Amber
234335
Neurosurgery
6/10/82

Amber is 6 years old. From her head standpoint, there have been no problems of shunt dysfunction. Her last abdomen x-rays showed 10 cm of tubing left in the peritoneal cavity, and this was done in March 1982. Of concern, Amber has been walking more and more on her toes. Her hamstrings have become quite tight, and both Miss Carpenter of Scottish Rite and her physical therapist have made notes and comments about this. Her toes are curling under as well. She just had surgery for a dislocated hip. She has an up-going toe on the right. Her mother states this is not new, but I think that her gait deterioration is likely related to her tethered cord problem. She will be admitted in July for myelography and surgery.

Frederick Sklar, M.D.

1. of 21

TATRO, Amber
234335
Neurosurgery
7/22/82

Amber had her tethered cord released, and she had an uncomplicated post-operative course. She returns today for suture removal. The wound has healed nicely. I am pleased with how she has done, and I plan to see her again in 3 months' time. Her mother feels that she has a bit more knee function than she did before. Time will tell.

Frederick Sklar, M.D.

TATRO, Amber
234335
Neurosurgery
3/4/82

Amber has been doing reasonably well from a clinical standpoint, but Dr. Moody feels that her esotropia has gotten worse on the left. He has already done eye muscle surgery years ago, and he feels that new surgery will be necessary. He has questioned whether her shunt is working. She has not had any overt symptoms of intracranial hypertension. She occasionally says that she does not feel well, but her family feels that this is more related to her copying her mother. She does not complain of headache. She is occasionally irritable in the afternoon. Her school performance has been relatively stable. She had formal psychometric testing at the Scottish Rite Hospital, and this will be repeated. Of concern, her head circumference measurement has increased to 52 cm from her last measurement of 51 cm just six months ago. This moves her measurement up to the 75th percentile. There is no fluid along the shunt, and I can get a thrill on rapid successive pumping.

It has been quite some time since Amber had a CT scan and VER's, and I will arrange for these to be done. She will have repeat psychometric testing. She will have skull x-rays today to check on the status of the sutures, and abdomen x-rays to check on how much tubing is left within the peritoneal cavity. I will review these studies once they are done and get back with Mrs. Tatro. Assuming there is no problem, she will go ahead and have her eye muscle surgery, and I will see her again in six months' time.

Frederick Sklar, M.D.

IRVING INDEPENDENT SCHOOL DISTRICT
OCCUPATIONAL/PHYSICAL THERAPY REPORT

NAME: [illegible] D.O.B. 10/[illegible]

DATE: August [illegible]

[illegible]

LONG RANGE GOALS:

[illegible]

PROGRESS:

[illegible]

RECOMMENDATIONS: [illegible]

[illegible]

Occupational/Physical Therapy
Dept. of Special Education
3801 Jessamine Street
Irving, Texas 75061

8/25/83 [illegible]
Therapist

17-[illegible]

[illegible]
[illegible]/75
[illegible]
[illegible] Therapy Goals

[illegible] Therapy Goal: To further develop general mobility with bracing and [illegible] which will [illegible] in order to participate [illegible] activities.

[illegible] [illegible] Long Term Objectives: [illegible]

1. [illegible] will ambulate [illegible] approximately, within 5 minutes.
2. [illegible] will put on [illegible], with minimal assistance, within 10 minutes.
3. [illegible] will walk with [illegible] to approximately 60% of the [illegible] during the school day - [illegible] with increased ball time.
4. [illegible] will negotiate stairs with minimum assistance.
5. [illegible] will maintain full ranges of motion of her hamstring muscles.
6. [illegible] will maintain general body strength through a neuromuscular program [illegible] developed on an ongoing basis.

Best Copy Available

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...VING INDEPENDENT SCHOOL DISTRI
OCCUPATIONAL / PHYSICAL THERAPY REPORT

NAME: [illegible] D.O.B. 10-11-15

DATE: [illegible]

[illegible]

LONG RANGE GOAL:

[illegible]

PROGRESS:

[illegible]

RECOMMENDATIONS:

[illegible]

Occupational Therapist
[illegible]

[illegible]
Therapist

Best Copy Available

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Best Copy Available

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August 22, 1983

Adapted Physical Education Report

Amber Tatro received adapted physical education instruction one day a week during the 1982-83 school year. During this time improvement was seen in eye-hand coordination. Amber meet the first and second short range goals which dealt with catching a bounced ball. The third short range of bouncing and catching was not reached.

During the 1983-84 school year I am recommending that Amber be mainstreamed into the regular second grade physical education class at least one day during the week. I will go with her to class to assist in any way possible. Also, I will be available to give suggestions to the physical education teacher in ways to adapt games and activities so that Amber may be involved as much as possible.

Sincerely,

Kathie Shaffer

Kathie Shaffer
Adapted Physical Education, IISD

ARD Minutes - Amber Tatro Minutes - June 26, 1983
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Present:

Names		Position
mom + dad	parents	
Barbara Lapia	friend/babysitter	
Phyllis Jones	teacher 1st & 2nd gr.	
Mary Bingfeldt	speech clinician	Suki Sagad - diagnostician
Mona Clarke	R.N.	Sam Parker - written language resource teacher, recorder
Darlene Braun	4th gr. teacher	
Susan Radford	Math resource	
Roy Curry	Principal, Chm.	

Minutes:

Neurosurgery reports were over a year old. Parents will have more recent reports, regarding 2 most recent operations and status, sent to the school. Reports of progress from OT/PT and Adaptive PE. were reported. Good progress was indicated (see reports). Achievement assessment indicated growth in all academic areas. 1st grade teacher indicates good cooperation from Amber except where fine motor activities were involved. Appeared to know rules (ie. punctuation, capitalization) but was reluctant to demonstrate skills when writing was involved. Exercises need to be adapted if writing activities are involved. Overall - average 1st grade student. Resource teacher reported progress in written expression - indicating primary need is with handwriting rather than English and spelling.

Parents indicated surgery for shunt had been recommended but will not be performed at this time. Next appraisal is due October 6, 1983 for academically, she finished 1st grade as an average student.

Behaviorally, she responded well to teacher instruction and was cooperative with teachers and peers.

Written expression will include resource help in the area of handwriting, with English and spelling

Skills re. ~~re~~ monitored. Time will be 2 19 of 21 minutes daily
The math resource teacher explained her program.
Amber will be receiving math resource for 45 minutes
daily, aiming at a mastery on mid-2nd grade level.
Mother ~~re~~ indicated Amber has difficulty saying
/r/. The speech pathologist indicated /r/ sound is a late
developing sound, an evaluation will be done within
30 school days.
Goals and objectives of OT/PT and adaptive PE. were
reviewed in Diagnostician regarding braces, crutches,
and CIC services (See Reports)
The school nurse will perform CIC services at
9:30 A.M. and 12:30 P.M. daily.
Her (Amber) assignment in Oct. '83
She will be in regular 2nd grade class.
Transportation is reimbursed. RB 10-13

Minutes were read and approved.

VI. SUMMARY OF DELIBERATIONS

A. Assessment data was considered ✓ Yes ____ No

B. Alternative placements reviewed: Regular second grade with resource classes in the least restrictive environment.

C. Additional and/or related services discussed:
See IEP for related services

D. Recommendations: See decision (E.) below.

E. Decision:
Continue regular second grade with resource classes for written language (learning of handwriting mechanics skills) and math; related services to be provided are occupational therapy, physical therapy, + counseling, of c IC on a twice daily basis. A speech evaluation within 30 working days was also requested. A routine physical education is on a consultation basis.

Page 21 of 21

I have participated in all of the decisions listed on the preceding pages:

VOTING MEMBERS

Ray L Curry
Administration Yes ✓ No ___ *

Voc. Admin. Yes ___ No ___ *

Sue Coyle
Assessment Yes ✓ No ___ *

Voc. Teacher Yes ___ No ___ *

Instruction Yes ✓ No ___ *

V.H. Yes ___ No ___ *

Parents/Student Yes ✓ No ___ *
Mary L Latta

A.H. Yes ___ No ___ *

LPAC Representative Yes ___ No ___ *

* Voting members casting dissenting votes may express objections on bottom of this form.

I give my permission for Amber Leigh Latta (Student) to receive the special education services described in this plan. I understand that my permission may be revoked at any time.

Mary L Latta
Parent's or Adult Student's Signature

5/24/83
Date

ADDITIONAL COMMENTS AND OTHERS PRESENT:

Phyllis Jones - regular classroom teacher
Barbara Tapia Babysitter
Mary Bonfield, Spanish Bilingual
[illegible] Nurse
[illegible] Special Needs
[illegible] Resource Teacher

Addendum to OT Goal.

IEP SUPPLEMENTAL GOALS 1983-84 School Year Page _____ of _____

Body - Coordination

Goal # 1: To provide body-coordination in a reclining position

Objective #1: To coordinate body in a reclining position with limited assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 1-84
Implementor: School nurse

Objective #2: To coordinate body in a reclining position without assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 2-84
Implementor: School nurse

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

Goal # 2: To provide body coordination in the restroom.

Objective #1: To coordinate body in the restroom with assistance.

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 4-84
Implementor: School nurse

Objective #2: To coordinate body in the restroom without assistance

Criteria for evaluation: Body-coord. evaluation
Schedule for evaluation: 5-84
Implementor: School nurse

Objective #3:

Criteria for evaluation:
Schedule for evaluation:
Implementor:

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No. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

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HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

The effort to raise additional questions for review, and the *Statement of the Case* tendered by Respondents, require the Petitioner to reply and to clarify the factual and legal issues before the Court. The following is intended to supplement the Petitioner's Statement of the Case and to correct the inaccuracies and/or omissions contained in Respondents' Statement of the Case.

1. Amber Tatro was, at all times relevant to these proceedings, entitled to special education *solely* because she was *orthopedically* impaired. This was so stipulated by the parties, and Respondents have never contended to the contrary. (J.A. 8a) The requested *medical treatment* of "Clean Intermittent Catheterization" is not, in any

way, related to the care or treatment of her orthopedic handicap. (J.A. 9a, 11a, 12a) (Dft. Ex. 7; Vol. 3, p. 393).

2. Respondent has never contended the requested medical treatment was a "supplementary aid or service." (J.A. 6a, 14a) Education of Amber in the *least restrictive environment* has never been at issue since the Petitioner's Early Childhood Development classes were only for pre-kindergarten, eligible handicapped students. ("Pet. Brief") at 3. The issue of educating Amber with children who were not handicapped has thus never been in question since the Petitioner did not offer education to *non-handicapped*, pre-kindergarten students. (R. Vol. 4, p. 318) (Pl. Ex. 5a, b, c; R. Vol. 3, p. 137).

3. The simplicity or complexity of the requested *medical treatment*, and what it involves, is determined by referring to the Pre-Trial Order, Stipulated Facts (J.A. 9a, 10a) (Pet. App. 1a), and "Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia." (Dft. Ex. 7; R. Vol. 3, p. 393).

4. It was stipulated by the parties "Clean Intermittent Catheterization" was *medical treatment* (J.A. 12a), and that prescribing such *medical treatment* is a medical function and the sole responsibility of the treating physician. (J.A. 12a) To provide the requested *medical treatment* without a valid medical prescription would constitute the unlawful practice of medicine. (Pet. App. 12a) Respondents have not previously contested such finding, nor perfected any appeal therefrom.

5. Respondents *now* contend the Petitioner's policy concerning the dispensing of oral medication and administering emergency injections forms the basis for discrimination. ("Resp. Brief") at 23 and 41. Pl. Ex. 2 (Tr. 38). Respondents have not contended the benefits of such

policy have been denied Amber or any handicapped child. The policy was enacted by the Petitioner pursuant to legislative authority, TEX.EDUC.CODE § 21.914, in order that its employees be immune from civil liability for damages if they give a student prescribed oral medication. (R. Vol. 2, pps. 357, 372, 373) Respondents do not contend there is similar legislative authority and immunity from civil liability if the Petitioner's employees administer, or fail to administer, the requested *medical treatment* at issue in the case at bar.

ARGUMENT

Respondents' brief seems basically designed to ignore the pertinent, relevant facts on which the decision of the Court below was based, most of which they agreed to. They want to ignore that "Clean Intermittent Catheterization" is *medical treatment*, that Petitioner could not lawfully provide it, and that prescribing such *medical treatment* is the sole responsibility of the treating physician and is purely a *medical* (as opposed to an *educational*) function. (J.A. 12a) (Pet. App. 12a) Having done so, the Respondents want this Court to also ignore the pertinent, relevant facts, and analyze, emotionally, a most complex and delphic act of Congress in order to reach a desired result.

Perhaps the District Court best described the difficult role this Court must play when it described its own:

> "Amber's plight tugs at the heartstrings, and given the relative rarity of spina bifida, there is a temptation to here achieve a 'humane' result. Despite the limited number of times school boards may be faced with a child requiring CIC, the interpretation of these federal statutes has wide consequences because it involves definitions of the duty of hundreds of school districts to be discharged in myriad factual

> patterns. The limits on this court's institutional role here gives little play for this court's humanitarian concern for Amber and her parents. This court instead is called on to engage in the relatively emotionally barren task of providing the interstitial stuffing to acts of Congress against a background of its intent and purpose in enactment." (Pet. App. 87a)

As we now discuss, as unemotionally as we can, Respondents' brief addresses the central issues only indirectly.

1. Denial Of Clean Intermittent Catheterization Does Not Result In Excluding Amber From The Public Schools, Nor Deny Her The Benefits Of A Free Appropriate Public Education.

Amber is entitled to, and the Petitioner is obligated to provide, a "free appropriate public education" defined at 20 U.S.C. § 1401(18) to mean:

> ". . . special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate pre-school, elementary, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title."

An "individualized education program" is defined at 20 U.S.C. § 1401(19) to mean:

> ". . . a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, *specially designed instruction* to meet the unique needs of handicapped children, the teacher, the parent or guardian of such child, and, whenever appropriate, such child, *which state-*

ment shall include (A) a statement of the present levels of educational performance of such child; (B) a statement of annual goals, including short-term instructional objectives; (C) a statement of the specific *educational* services to be provided to such child, and *the extent to which such child will be able to participate in regular educational programs;* (D) the projected date for initiation and anticipated duration of such services; and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." (Emphasis added.)

Section 1414(a)(5), referred to in the definition of "free appropriate public education," requires the local educational agency to "provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an "individualized education program" for each handicapped child at the beginning of each school year, and will then review and, if appropriate, revise its provisions periodically, but not less than annually."

In order to qualify for assistance under 20 U.S.C. § 1400 et seq., the State must satisfy the Commissioner that it has established procedures to assure that, to the maximum extent *appropriate*, handicapped children are educated with children who are not handicapped, and that other removal of handicapped children from the regular educational environment occurs only when the *nature or severity* of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5).

A local educational agency which desires to receive payments under 20 U.S.C. § 1411(d) submits an application to the State educational agency, which shall provide satisfactory assurance payments under the statute will be

used for excess costs directly attributable to programs which:

> "(C) establish a goal of providing full educational opportunities to all handicapped children, including:
>
> (iv) to the maximum extent *practicable* and consistent with the provisions of Section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;" 20 U.S.C. § 1414(a)(1)(C)(iv). (Emphasis added.)

The regulations implementing 20 U.S.C. § 1400 et seq. concerning "placements" and "least restrictive environment" require each State educational agency to insure that each public agency establishes and implements procedures which meet the following requirements, 34 C.F.R. § 300.550:

> Handicapped children are educated with children who are not handicapped to the maximum extent *appropriate*, and removal of handicapped children from the regular educational environment occurs only when the *nature* or *severity* of the handicap, with the use of *supplementary* aids and *services*, cannot be achieved satisfactorily. 34 C.F.R. § 300.550(b)(1), (2).
>
> The public agency must make available a continuum of alternative placements, and make provision for *supplementary services in conjunction with* regular class placement, such as resource room or *itinerant instruction*. 34 C.F.R. § 300.551(a) and (b)(2).
>
> Each handicapped child's educational placement must be determined at least annually, based on their *individualized education program*, and have to them available the continuum of alternative placements to the extent necessary to implement the *individualized education program*. In selecting the least restrictive environment, each public agency

> shall insure that *consideration is given to any potential harmful effect* on the child or on the quality of services which they need. 34 C.F.R. § 300.552.

Respondents would have us believe that without the *medical treatment* prescribed by Amber's doctor being furnished to her at public expense with no cost to her parents, Amber will be completely excluded from public education and be denied the benefits of "specialized instruction" to meet her unique needs. ("Resp. Brief") at 9. Respondents' brief would lead Amber and Petitioner's school teachers to believe they have only three options if Amber is not furnished the *medical treatment* by Petitioner; (1) Amber's parents must provide or pay for the *medical treatment*, (2) Amber must be placed in a special school for handicapped children, or (3) Amber must be kept at home, ("Resp. Brief") at 10, 12, and 13. Such a limiting analysis of the educational opportunities available to Amber disregards the foregoing statutory and regulatory provisions, their legislative history, and this Court's decision in *Board of Education* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Petitioner recognizes Amber is entitled to be educated with non-handicapped children to the maximum extent *appropriate* for *her*. It also recognizes that Amber, and other children similarly situated, cannot be placed in, what might otherwise be, the "least restrictive environment" without considering the *potential harmful effect* such a placement would have on Amber. *Board of Education* v. *Rowley*, *supra*, at 3038, n.4; 34 C.F.R. § 300.552. For this reason, Petitioner must provide Amber a continuum of alternative placements for her specialized instruction, and make provision for providing her *supplementary* services (such as itinerant instruction) in conjunction with regular class placement. 34 C.F.R. § 300.551.

Amber is receiving the *medical treatment* prescribed by her doctor pursuant to the orders of the District Court. Should this Court agree with Petitioner that 20 U.S.C. § 1400 et seq. does not require Petitioner furnish *medical treatment* prescribed by a private physician, Amber and other handicapped children will *not* automatically be excluded and segregated from public schools or from non-handicapped children as Respondents' brief so direly predicts.

Amber's "individualized education program" may require revision. Complying with the procedural safeguards of 20 U.S.C. § 1415, 34 C.F.R., Part 300, Subpart E, and the State Plan in revising such program should assure Amber the content of her "individualized education program" will provide her the basic floor of educational opportunity envisioned by Congress, and be reasonably calculated to enable her to receive a free appropriate public education in "the least restrictive environment." *Board of Education* v. *Rowley, supra,* at 3050, 3051.

As the Court noted in *Rowley, supra,* at 3052, entrusting Amber's education to this process does not leave her without protection. By providing for parental involvement in the development and formulation of Amber's "individual educational program," Amber is assured she is protected and appropriate educational services are provided her. "As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Board of Education* v. *Rowley, supra,* at 3052.

2. Reasonable Accommodation Of The Handicapped And Section 504 Of The Rehabilitation Act.

Respondents' brief would attempt to lead to a conclusion Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, creates some obligation and rights independent of 20 U.S.C. § 1400 et seq. Such an analysis and conclusion disregards, and is contrary to, the statutes and its implementing regulations. Further, it is not supported by the record.

Section 504 prohibits discrimination against an otherwise qualified individual, solely by reason of their handicap, under any program or activity receiving Federal financial assistance. 29 U.S.C. § 794. Regulations implementing Section 504 provide that the development and implementation by a recipient of an "individualized education program" in accordance with 20 U.S.C. § 1400 et seq. satisfies the requirement to provide a qualified handicapped person a free appropriate public education.

Compliance with 20 U.S.C. § 1400 et seq. satisfies Section 504. If 20 U.S.C. § 1401(18) and (19) does not require Petitioner provide medical treatment to its handicapped students, Section 504 cannot require it.

Conversely, Section 504 may not require "substantial adjustments in existing programs . . .", *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411; 99 S.Ct. 2361, 2369 (1979), nor require the provision of services that would impose "undue financial and administrative burdens" upon the recipient. *Southeastern Community College* v. *Davis*, *supra*, 99 S.Ct. at 2370. "Thus, for example, Section 504 may not require the school district to provide a very expensive procedure like kidney dialysis to a child who needs such a service during the school day." *Tatro* v. *Texas*, 625 F.2d 557 (1980) ("Tatro I"). (Pet. App. 108a) Such *medical treatment*, however, could

be required under 20 U.S.C. § 1401(18) if it is prescribed by the handicapped child's doctor and delegated to the school district, regardless of the cost, adjustments, or burdens.

The same result is reached if the handicapped child's doctor chooses to prescribe "Sterile Catheterization" rather than "Clean Intermittent Catheterization." ("Resp. Brief") at 3. Either the public school does what the doctor prescribes, or it challenges the doctor's prescription as not complying with the "standard of medical practice" believed to be the most current at the time. If the Education of All Handicapped Children Act requires *medical treatment* be provided, whether Section 504 requires it or not is a moot issue.

Resolving the central issue in this case is thus not aided by determining whether or not providing *medical treatment* is a "reasonable accommodation" to enable a handicapped child to benefit from any program or activity receiving Federal financial assistance. The issue can only be resolved by determining whether or not Congress requires the public schools to provide the *medical treatment* prescribed by a private physician under the provisions of 20 U.S.C. § 1400 et seq.

Respondent's brief at 41 also contends Petitioner has discriminated against Amber under classical discrimination analysis. Although there are no findings or evidence to support such contentions, a brief reply should lay the matter to rest.

The policy of Petitioner concerning the dispensing of oral medications was adopted pursuant to specific legislative authorization (Pl. Ex. 2), V.T.C.A., Education Code § 21.914. The statute is set forth in its entirety as an appendix to this brief.

Both the statute and the subject policy, on their face, treat the handicapped student and the non-handicapped student the same. The record is void of evidence or findings to the contrary.

CONCLUSION

To paraphrase Justice BLACKMUN, perhaps the parties and the courts below have focused too narrowly on the presence or absence of a particular service rather than on the total package of services furnished to Amber by the School Board. *Board of Education* v. *Rowley*, *supra*, at 3053.

For the reasons stated here and in Petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

VER. TEX. CODE ANN. (Vernon Supp. 1984) Education Code

§ 21.914 ADMINISTERING OF MEDICATION BY SCHOOL DISTRICT EMPLOYEES: IMMUNITY FROM LIABILITY

(a) As used in this section, "employees" means superintendents, principals, classroom teachers, supervisors, counselors, registered nurses, teachers aides, secretaries, or any other classified person employed by a school district.

(b) The board of trustees of each school district shall adopt policies concerning the administering of medication to students by employees of the district.

(c) On the adoption of policies as provided in Subsection (b) of this section, the school district, its board of trustees, and its employees shall have immunity from civil liability from damages or injuries resulting from the administering of medication to a student, if:

(1) the school district has received a written request to administer the medication from the parent, legal guardian, or other person having legal control of the student; and

(2) when administering prescription medication, the medication appears to be in the original container and to be properly labeled.

(d) Nothing herein shall be construed to grant immunity from civil liability for injuries resulting from gross negligence.

Added by Acts 1977, 65th Leg., p. 1268, ch. 491, § 1, eff. June 15, 1977. Amended by Acts 1979, 66th Leg., p. 1072, ch. 502, § 1, eff. June 7, 1979.

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Respondents.

ON WRIT OF CERTIORARI FROM
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THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTERESTS OF THE AMICUS CURIAE

In the United States, there are today between 15,000-16,000 public school districts. The amicus, the American Association of School Administrators, is a national educational and charitable organization of the educational administrators who work for these school districts with membership totaling

17,500. The members of the American Association of School Administrators are employed in approximately 90% of the nation's school districts. These school administrators are responsible for advising local school districts on their policies, and providing leadership for the school districts in long-range educational and financial planning.

If the decision in *Tatro* v. *State of Texas*, 703 F. 2d 823 (5th Cir. 1983) (hereinafter *Tatro II*) is upheld, it will have a serious, detrimental impact upon the policies and practices of school districts. Specifically, it will require the school districts to provide clean intermittent catherization (hereinafter CIC) for all students requiring such special services. More important, however, its rationale would require school districts to offer a host of other quasi-medical services on an open-ended basis. An affirmance would seriously impair the financial and educational ability of school districts to provide equal educational opportunity to all children. It is in the interest of administrators of public school districts that we file this amicus brief.

ISSUES PRESENTED FOR REVIEW

I.

DID THE *TATRO II* COURT ERR IN FINDING THAT CIC IS A RELATED SERVICE UNDER THE EAHCA?

II.

DOES THE EAHCA EXCLUSIVELY GOVERN THE RIGHT OF HANDICAPPED CHILDREN TO SPECIAL EDUCATION?

ARGUMENT

Introduction

The *Education for All Handicapped Children Act,* 20 U. S. C. § 1401 *et seq.* (1975) (hereinafter EAHCA) provides that all handicapped children are entitled to a "free appropriate public education" individually suited to their unique needs. Less than two years ago, in *Board of Education of the Hendrick Hudson Central School District Board of Education* v. *Rowley,* ___ U. S. ___, 102 S. Ct. 3034 (1982) (hereinafter *Rowley*) this Court stated that the EAHCA was designed to provide "a basic floor of opportunity" for handicapped children. The Court held that the EAHCA provided handicapped children with a substantive right to a free and appropriate public education, as well as the necessary procedural guarantees to secure that substantive right.

Congress' definition of "free and appropriate public education" encompasses the educational component and the "related services" component necessary for the handicapped student to benefit from the educational program. In *Tatro II,* the court has misconstrued the meaning of the "related services" component of special education. That error must be corrected.

The *Tatro II* court ignored the plain meaning of the statute and its legislative history. Instead, it developed a three part test to measure the extent of related services. That test expands the responsibilities of public schools beyond anything contemplated by Congress when it passed the EAHCA. If affirmed, the *Tatro II* holding will require public schools to provide handicapped students with quasi-medical services which schools are unequipped to provide and which are not services related to the student's education.

The *Tatro II* decision also raises for this Court's consideration the issue of the interrelationship between the EAHCA

and Section 504 of *The Rehabilitation Act of 1973*, 29 U. S. C. § 794 (1978 Supp. III) (hereinafter Rehabilitation Act). The EAHCA does not provide for attorneys' fees. The Rehabilitation Act does. 29 U. S. C. § 794a (1978 Supp. III) In *Tatro II*, the court held that a school district's failure to provide CIC violated both the EAHCA and the Rehabilitation Act; the court awarded the plaintiffs attorneys' fees pursuant to the attorneys' fees provision of the Rehabilitation Act. The award of attorneys' fees is contrary to the intent of Congress that a violation of the rights of special education students is exclusively governed by the remedies of EAHCA.

The *Tatro II* court's misreading of Congressional intent disregards this Court's teaching in *Rowley* and *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979). The *Tatro II* decision subjects public school districts and their administrators throughout the United States to a damage remedy never contemplated by Congress when it enacted the EAHCA.

I.

THE *TATRO II* COURT ERRED IN FINDING THAT CIC IS A RELATED SERVICE UNDER THE EAHCA.

A.

Neither the EAHCA Nor Its Implementing Regulations Support the Court's Holding.

The EAHCA provides all handicapped children the right to a free and appropriate public education as defined in the EAHCA and its regulations promulgated by the Department of Education at 34 C. F. R. § 300.13 (1982). The basic substantive educational right is defined in the EAHCA as:

> (18) "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards

> of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title." 20 U.S.C. § 1401(18) (1975).

Further definitions of "special education" and "related services" are found in Sections 1401(16) and (17) of the EAHCA. They state:

> (16) "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions, as well as related services." 20 U.S.C. § 1401(16) (1975).
>
> (17) "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 U.S.C. § 1401(17) (1975).

The regulations define "medical services" as:

> "(4) 'Medical services' mean services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services. 34 C. F. R. § 300.13(4)(b) (1982).

By express definition, school districts need not provide medical services to handicapped students unless they are solely for diagnostic and evaluation purposes. 20 U. S. C. § 1401(17) (1975). The legislative history of the EAHCA reveals that when the EAHCA was before the Senate there was no provision

for any medical services in the Act. *See* S. 6, 94th CONG., 1st SESS (1975). In the House, amendatory language was added to the EAHCA allowing special education students to receive "medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." S. CONF. REP. No. 94-455, 94th CONG., 1st SESS., 30 (1975), *reprinted in* 1975 U. S. CODE CONG. AND AD. NEWS 1425, 1483. Under the plain language of the final statute, Congress did not require school districts to furnish medical services to a special education student.

The *Tatro II* court acknowledges that medical services should not be furnished to a special educational student. Instead, it held that CIC is a "supportive service", thus avoiding the statutory prohibition against furnishing medical services. The court's holding has no basis in the statute or regulations.

B.

The *Tatro II* Court's "But For" Test for the Provision of Related Services Has No Basis in the Statute.

Hard cases indeed make bad law. The *Tatro II* court created out of thin air a new three-part test so as to read the requirement of quasi-medical services into the IEP of a spina bifida child. First, a child must need special education. Second, the particular service must be necessary to aid a handicapped child to benefit from special education. Third, a school district must provide quasi-medical services if they can be furnished by a nurse or other qualified person. This test has no basis in the EAHCA. Moreover, the court's application of the test leads to results inconsistent with the *Rowley* test of educational benefit to the child.

In applying the second prong of its three part test, the Fifth Circuit applied a "but for" test to the facts. *Tatro II,* in its simplest terms, holds that the student was entitled to CIC as a related service because she could not attend her program "but for" the CIC. The court held, therefore, that CIC is educationally necessary.

The "but for" rule of *Tatro II* violates the teaching of *Rowley,* which is that the financial and social burdens of providing supportive services to special education students should not be placed upon a school district simply because the services will provide optimum benefit to a student. In *Rowley,* this Court interpreted the EAHCA as requiring the states to provide educational opportunity and services. Pursuant to *Rowley,* a school district need only provide related services in an IEP calculated to provide a student an educational benefit. Under the "but for" rule of *Tatro II,* however, a school district must provide any quasi-medical or health services which are in any way necessary to the student.

The appellate court's holding in *Tatro II* and in *Tatro* v. *State of Texas,* 625 F. 2d 557 (5th Cir. 1980) (hereinafter *Tatro I*) has been criticized by the Circuit Court of Appeals in *Kruelle* v. *New Castle School District,* 642 F. 2d 687 (3rd Cir. 1981). The court stated:

> "... there is an inner dynamic to the *Tatro* analysis which is troublesome: ultimately any life support system or medical aid can be construed as related to a child's ability to learn." 642 F. 2d at 594.

If properly applied, the *Rowley* standard of educational benefit for provision of related and supportive services will result in a finding that CIC is not a related service. It is undisputed in *Tatro II* that the student benefited educationally from her initial placement in which the school district did not

provide CIC. Judge Higginbotham, in the initial trial court ruling in this matter, correctly upheld the school district's IEP, refusing to provide CIC services. *Tatro* v. *State of Texas,* 481 F. Supp. 1224 (N. D. Tex. 1979).

Moreover, the facts and claims in *Tatro II* are essentially similar to the facts and claims in *Rowley,* thus requiring a similar result. Rowley had attended classes without an interpreter. The parents in *Rowley* sought to alter the school district's IEP to include a sign language interpreter to provide the student "an opportunity to achieve her full potential commensurate with the opportunity provided to other children." *Rowley,* 102 S. Ct. at 3040 (1983). This Court found that Rowley had been attending school without an interpreter and was "interact[ing] and communicat[ing] well with her classmates. . ." *Id.* Rowley's sole claim, then, was that she was not "learning as much, or performing as well academically" as she would without a handicap. *Id.*

The Respondent, like the *Rowley* child, has attended her classes with her parents and babysitter performing the necessary CIC procedure during the school day, between January 26, 1981, to April 1, 1981, under the school district's original IEP. *Tatro* v. *State of Texas,* 516 F. Supp. 968, 972 (N. D. Tex. 1981). Her parents did not challenge the adequacy of the Petitioner's IEP or her placement in the early childhood development classes. They have challenged who was to furnish the CIC. As in *Rowley,* no question exists that the Respondent can benefit educationally without the supportive service of CIC. *Rowley,* accordingly, compels reversal of the *Tatro II* decision.

A ruling by this Court that the school district is not required to provide handicapped children with services such as CIC does not prevent the child from obtaining these services from other public health agencies. Any number of other state

and private organizations can provide and administer CIC; any necessary financial assistance is available from public health departments or under medical insurance plans. These agencies, not school districts, are the proper providers of services such as CIC, or such services as tracheostomies and kidney dialysis.

Every health service can be construed in some way to benefit a student in special education, for many, many special education students have related health problems. The EAHCA does not mandate medical services. They should not be required by renaming them as supportive services. *Rowley* requires handicapped children to receive supportive services that benefit them *educationally*. Failure to place this important limitation upon the furnishing of supportive services would place an unreasonable financial and social burden on school districts in contravention of the EAHCA.

C.

Medical Services Need Not Be Provided Under the Rubric of School Health Services.

The *Tatro II* court's third prong of its test is that a related supportive service can include any quasi-medical service so long as it can be performed by a qualified nurse or other trained person. This rule vastly extends the scope of related services to include all types of quasi-medical services which school districts are not in any manner equipped to perform.

There are some 15,000 to 16,000 school districts in the United States, with roughly 9,000 of these districts educating fewer than 2,000 students a year. Only 750 districts in our nation educate more than 10,000 students each year. The vast

majority of school districts in our nation are located in rural areas. They do not employ nurses and they are not equipped with the personnel nor the facilities to administer the type of services required by *Tatro II*. The cost of administering and hiring personnel to provide quasi-medical services would be financially staggering to school districts. If these services are mandated, and neither funds nor professional personnel are available, school districts would have to seek teacher volunteers to perform these services. Should no volunteers come forward, what then? Can the staff be forced to undertake a quasi-medical procedure?

An example of the consequences of an unwilling staff forced to perform these services is apparent in *Department of Education, State of Hawaii* v. *Katherine D.*, 531 F. Supp. 517 (D. Hawaii 1982), in which school personnel had filed a grievance charging violation of their contracts of employment by being required to perform duties of a medical nature, outside the scope of their contractual duties. The district court took specific notice of the school district's failed efforts to provide a handicapped child with a qualified individual to perform a tracheostomy.

> "At first glance, it may appear that the attitude of the school personnel was one of callousness and a 'lack of feeling' but when you explore the circumstances, it becomes clear that they responded to the plan with fear and trepidation. Fear that they could not perform the medical procedure correctly and that the child might die at their hands; or fear of the personal aspects of the procedure itself; and/or the fear of being sued if something untoward occurred during the procedure. These are genuine and legitimate fears and understandably so. Therefore, I cannot fault the school personnel for objecting to being asked to perform such medical procedures." 531 F. Supp. at 524.

The *Tatro II* definition of related services under the EAHCA is so broadly written that it includes *any* quasi-medical service that a handicapped student requires which a nurse or other qualified person can perform. Thus, services, such as CIC, tracheostomies and kidney dialysis would be included under "related services". This definition does not comport with the intent of Congress, as established in *Rowley,* and the plain language of the statute and regulations that require medical services solely to diagnose and evaluate a handicapping condition.

The statutory limitation on rendering services is premised on the *educational* rights of the handicapped child. The *Tatro II* holding simply ignores the fact that *education* is the foundation of the EAHCA. If *Tatro II* is affirmed, school districts would be forced to bear greatly increased expenses in the areas of personnel, insurance and costs of training their school personnel to comport with the quasi-medical needs of all handicapped children. The resultant burdens of the *Tatro II* decision are not in keeping with the holding or spirit of *Rowley.*

II.

THE EAHCA EXCLUSIVELY GOVERNS THE SPECIAL EDUCATION RIGHTS OF HANDICAPPED CHILDREN.

The second major issue raised by *Tatro II* is whether a school district's decision to provide or not provide a particular related service is actionable under both the EAHCA and the Rehabilitation Act. If so, can the attorneys' fees provision of the Rehabilitation Act be used to supplement remedies available under the EAHCA?

In *Tatro II,* the court held that, if a claim made under the

Rehabilitation Act is factually identical to a claim under the EAHCA, the Respondent gains access to Rehabilitation Act remedies otherwise unavailable under the EAHCA.

That holding is contrary to the intent of Congress that a student's right to special education services is exclusively found in the EAHCA. Two circuit courts that have considered the issue have properly applied this Court's teachings in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981) and *Rowley, supra.* These circuit courts have held that the EAHCA was intended as an exclusive remedy for violations of a student's right to special education. The Rehabilitation Act, according to these holdings, are unavailable as a cause of action for denial of rights created by the EAHCA. *Smith* v. *Cumberland School Committee,* 703 F. 2d 4 (1st Cir. 1983), *cert. granted, sub nom, Smith* v. *Robinson,* ____ U. S. ____, 52 U. S. L. W. 3342 (1983); *Timms* v. *Metropolitan School District,* ____ F. 2d ____, 1983-1984 Ed. Hand. L. Rptr. 555:178 (7th Cir. 1983).

A.

The EAHCA Solely Governs This Claim.

The EAHCA is a comprehensive law creating a substantive right to special education for handicapped children and creating detailed procedural protections to assure that the substantive rights created by the statute are not violated.

The only substantive question raised by *Tatro II,* as discussed above, is whether CIC qualifies as a related service. The Respondents also allege that the refusal to provide this particular special education service violates the general nondiscrimination requirements of the Rehabilitation Act so as to gain access to the attorneys' fees provision in that statute.

The Respondents' claim, however, is completely resolvable pursuant to the detailed procedural protections created by the EAHCA. This Court in *Rowley* emphasized the comprehensiveness of the procedures and the importance Congress placed upon the statute's procedural guarantees, holding:

> "It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures ... as it did upon the measuring of the resultant IEP against a substantive standard." 102 S. Ct. at 3050.

The EAHCA provides for judicial review of administrative decisions. 20 U. S. C. § 1415(e)(2) (1975). The Court determined the scope of that review in the *Rowley* holding that Section 1415(e)(2) requires the court to determine whether the state has complied with the procedures set forth in the Act and whether the IEP is "reasonably calculated to enable the child to receive his educational benefit". *Rowley*, 102 S. Ct. at 3051. In other words, a court may review both the substance of the special education placement and whether the school district was in compliance with the EAHCA's procedural guarantees. There is no need to refer to a general non-discrimination statute, particularly when the claim is, as in this case, the narrow one of furnishing a related service.

As the Seventh Circuit recently stated:

> "A reading of the broad provisions of the *EAHCA* in light of the Supreme Court's interpretation inevitably leads to the conclusion that the *EAHCA* itself meets all a parent's needs to assure their children receipt of the benefits of the Act..." *Doe* v. *Koger*, 710 F. 2d 1209, 1213 (7th Cir. 1983).

The exclusiveness of the remedies created by the EAHCA is reinforced by two recent opinions of this Court considering the same question in the context of other statutes. In *Great American Federal Savings and Loan Association* v. *Novotny*, 442 U. S. 366 (1979), the Court held that 42 U. S. C. § 1985 (1980) could not be invoked to redress violations of Title VII.

29 U. S. C. § 2000(e) (1981). In so holding, the Court noted that Title VII, like the EAHCA, creates a "detailed administrative and judicial process designed to provide opportunity for non-judicial . . . resolution of claims." *Novotny*, 442 U. S. at 372-373. Previously, in *Brown* v. *GSA*, 425 U. S. 820 (1976), this Court had considered Section 717 of Title VII and found, in light of "the balanced completeness and structural integrity" of Title VII, that Congress had intended to create an "exclusive pre-emptive administrative and judicial scheme . . ." 425 U. S. at 829.

In the EAHCA, as the Court noted in *Rowley*, Congress created new substantive rights and a detailed administrative and judicial procedure to protect those rights. That procedure is clearly intended by Congress as the exclusive remedy for violation of these substantive rights. This conclusion is compelled by comparing the EAHCA to the Rehabilitation Act.

B.

The Rehabilitation Act Is Not Applicable to the *Tatro II* Case.

Unlike the EAHCA, the Rehabilitation Act is a broad nondiscrimination statute which prohibits recipients of federal aid from discriminating against otherwise qualified handicapped persons. The meaning of this statute was considered by the Court in *Southeastern Community College* v. *Davis, supra.* The Court considered a claim by a deaf student that the Rehabilitation Act requires a college to take affirmative action so that it could dispense with its requirement that students in the nursing program effectively communicate orally. The Court held that the Act did not require such affirmative action:

> "The language and structure of *the Rehabilitation Act of 1973* reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handi-

> capped persons and the affirmative efforts to overcome the disabilities caused by handicaps." 442 U. S. at 410.

The Court then went on to consider regulations of the Department of Health and Education, which arguably required affirmative action on the part of recipients of public aid:

> "If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute." 442 U. S. at 410.

The Rehabilitation Act, unlike the EAHCA, does not in any sense address the question of the appropriateness of a student's special education placement or the appropriateness of a particular related service provided or withheld to a special education student. This is, however, the only issue raised by the Respondents in *Tatro II*. In other words, the Petitioner has not discriminated against the Respondent on the basis of her handicap. It has provided her an appropriate special education placement with appropriate related services. To the extent the Respondent's parents disagree with the IEP, they have an express and exclusive remedy created by the EAHCA.

The irrelevance of the Rehabilitation Act to students' special education claims is reinforced by this Court's decision in *Pennhurst State School and Hospital* v. *Halderman, supra. Pennhurst* determined that Section 6010 of the *Developmentally Disabled Assistance and Bill of Rights Act*, 42 U. S. C. § 6010 (1978 Supp.), did not confer enforceable substantive rights on the beneficiaries of the Act. In so holding, the Court referred to *Southeastern Community College* v. *Davis, supra*, and noted the failure of the lower court, like the court in *Tatro II*,

> "... to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States ... Relying

> on that distinction, this Court, in *Southeastern Community College* v. *Davis;* . . . rejected a claim that 504 of *The Rehabilitation Act of 1973,* which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that 'state agencies such as Southeastern are only "encouraged[d]" . . . to adopt and implement such policies and procedures;' . . . we stressed that 'Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.' " 451 U. S. at 27.

The question of the appropriateness of a related service or special education placement has nothing to do, in the normal circumstance, with discrimination against otherwise qualified handicapped individuals. The provision or non-provision of a particular service or placement is the result of affirmative obligations specifically created by Congress in the EAHCA. When Congress has created such an affirmative obligation and created a detailed and comprehensive remedial structure to resolve disputes, that procedure should be considered exclusive.

Congress created the EAHCA and its remedial structure. It specifically failed to create a right to attorneys' fees as part of its remedies. To allow the Respondent access to the Rehabilitation Act solely to gain attorneys' fees when the claim is identical to the EAHCA clearly defeats the intent of Congress in passing the EAHCA. *See Timms* v. *Metropolitan School District, supra; Smith* v. *Cumberland School Committee, supra.* The Court should not allow plaintiffs to use other statutes as a means of obtaining remedies not provided by Congress in the EAHCA.

Absent an unequivocal Congressional expression of intent to the contrary, there is simply no basis to subject school districts and school administrators to a damage remedy never intended by Congress.

Conclusion

The American Association of School Administrators, as amicus curiae, respectfully requests this Court to effectuate the intent of Congress and find that CIC is not a related service under the EAHCA. The amicus curiae further requests that the Court prohibit the use of the Rehabilitation Act as a conduit to obtain attorneys' fees when the substantive claim in question is identical to that posed under the EAHCA.

Respectfully submitted,

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No. 83-558

IN THE

Supreme Court of the United States

October Term, 1983

Irving Independent School District,
Petitioner,

v.

Henri and Mary Tatro, Individually and
Next Friend of Amber Tatro, A Minor,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school board associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established

in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (the Act).

ISSUE PRESENTED FOR REVIEW

Whether defining "related services" under the Act to include clean intermittent catheterization (CIC) is consistent with the language of the Act and its legislative history.

ARGUMENT

I. INTRODUCTION

The analysis of the Fifth Circuit in both Tatro I, 625 F.2d 557 (1980) and Tatro II, 703 F.2d 823 (1983) is founded on a premise which has little or no basis in either the statute itself or its legislative history.

Under the ruling below, a school district is responsible for the provision of every health service required by a handicapped child if it must be administered during the school day and if it can be administered by someone other than a licensed physician. According to the lower court's rationale, a service is "related" to the special education of the child merely if the child needs the service during the school day, regardless of whether the service is educational in nature. Amicus agrees that the Congress intended to require the provision of all educational services necessary for the child to benefit from

special education, even though some of those educational services have medical or health overtones. But the Congress also intended to exempt services which are solely medical or health services.

20 U.S.C. § 1401(17) defines "related services" as:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

In order to avoid the express statutory exemption of medical services, the lower court narrowly defines such services as those which can only be provided by a physician. Thus, any service which can be provided by someone other than a physician could come within the

rubric of the lower court's strained definition. While the Congress included a requirement that districts provide diagnostic and evaluation services (even though such services can be considered "medical,") the primary purpose of this type of medical service is to assist in the education of the child rather than to sustain the child's life.

The decision below goes beyond the intent of Congress in its attempt to fund education services for handicapped children. It misapplies the exemption in the Act of "medical services." It results in a different standard of compliance in each state, based on the vagaries of the laws on the practice of medicine. It confuses the "related services" requirement with the requirement of "least restrictive environment." Finally, the decision below turns the non-discrimination requirement of the Act into an independent requirement that schools provide health

services to handicapped children, even when such services are not available to non-handicapped children.

II. THE LOWER COURT'S REQUIREMENT IS CONTRARY TO THE STATUTE AND THE INTENT OF CONGRESS.

Mandating that schools provide CIC, and other services related exclusively to the health of the child as "related services" under the Act is contrary to the intent of Congress in passing the Act.

Senator Jennings Randolph, the Senate sponsor of the Act, in his opening remarks during Senate debate on the Act, summarizes the purposes of the Act:

> First, all handicapped children living in a State who are in need of special education are identified, located, and evaluated; second, a goal is established to provide full educational opportunities to all handicapped children; third, priorities for services are established first with respect to handicapped children not receiving an education and second with respect to severely handicapped children

> receiving an inadequate education; fourth, procedures are established to safeguard the rights of handicapped children and their parents in decisions relating to identification, evaluation, and educational placement; fifth, a free appropriate public education be available for all handicapped children between the ages of 3 and 18 within a State. 121 Cong. Rec. S 10960 (June 18, 1975).

Senator Randolph's remarks evidence the intent of Congress to tie all requirements in the Act to the educational needs of handicapped children. It was not designed to address all the needs of handicapped children.

As this Court stated in the landmark case under the Act of **Hendrick Hudson v. Rowley,** 102 S. Ct. 3034 (1982):

> We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Respondents have not contended that Amber Tatro is not receiving an educational benefit

from the specialized instruction provided to her. Demands for CIC, a health service, are completely extraneous to the quality of Amber's education.

The Act defines "handicapped children" as those who "because of their impairments require special education and related services." Thus, if Amber's only "handicap" were her neurogenic bladder condition, she would not be "handicapped" under the Act because that condition alone does not give rise to a need for specialized instruction. The only reason the Act applies here at all is because of Amber's additional handicap which results in her need for specialized educational services. Congress was not attempting in the Act to fund or to require school districts to fund, any services for handicapped children other than those directly related to the special educational needs of the child.

In order to discern the intent of Congress, the Court's attention is directed to the original version of the Act as passed by the Senate. 121 Cong. Rec. S 10956 (June 18, 1975). That version did not, in its definition of "related services," include either medical or counseling services. The House version, however, did include such services but provided that the services were limited to those required for diagnosis and evaluation purposes only. The final version includes the House requirement and the limitation on the requirements.

Thus, Congress clearly expressed its intent to require the provision of medical services only where they are necessary for diagnosis or evaluation of the child. Apparently it was felt that diagnostic and evaluation services might not be provided by school districts unless expressly included in the statute. However, to clarify its intent

the Congress stated explicitly that the "medical" requirement goes no further than just diagnosis and evaluation.

The lower courts' attempt to avoid the express statutory limitation by defining "medical" in terms of who provides the service rather than the nature of the service, has no basis in the statute. The term "medical" in the statute was intended by the Congress to do nothing more than differentiate between services which are educational (although including health components) and services which are strictly health services. There is nothing in the statute or its history to support an argument that the Congress used the term "medical" to differentiate between health services provided by someone other than a physician and health services provided by a physician.

We direct this Court's attention to the description in the lower court's opinion of

the CIC procedures, 703 F.2d 823, 829. See Appendix. The description clearly shows that the procedure is a "medical procedure" designed solely to meet physical health needs rather than a diagnostic or evaluation device.

The lower court points out in a footnote, 625 F.2d at 564, n. 17, that the statutory definition of "related services" includes "physical and occupational therapy and recreation" as examples of "related services." The court states that it fails "to see how these services 'arise from the effort to educate any more than CIC'." A reading of the legislative history will elucidate.

In the debate on the Act, Congress expressed its concern that handicapped children have an opportunity to receive extra-curricular services, in addition to the curriculum designed to meet their unique educational needs. S. Rep. No. 168, 94th Cong., 1st Sess. 12 (1975); H. Rep. No. 332,

94th Cong., 1st Sess. 9 (1975). Thus, for example, the legislative history discusses physical education courses and the fact that such courses should be modified so that handicapped children can participate either along with non-handicapped children or, if appropriate, participate in a separate setting. Id. It also discusses the fact that handicapped children have a right to "health screening, transportation services and all other services which are provided to all children within the school system." S. Rep. No. 168, 94th Cong., 1st Sess. 12 (1975).

Members of both houses expressed concern that handicapped children be provided the opportunity to participate in extra-curricular activities, particularly physical education. "The Committee is concerned, although these services are available to and required of all children in our school system, they are often viewed as a luxury for handicapped children."

S. Rep. No. 168, 94th Cong., 1st Sess. 12 (1975). They cite the Special Olympics, the dance and drama programs at Gallaudet College and other examples of the arts and physical education as viable teaching tools. Id. at 13. Nothing in the legislative history implies, however, that health services not provided to non-handicapped children and not educationally necessary must be provided to handicapped children. All of the discussion on extra-curricular activities and physical education and health services (not evaluative or diagnostic) revolves around the non-discrimination core of the Act. These requirements do not stand alone.

Further, the definition of "special education" includes "instruction in physical education" so it is certainly appropriate to include a reference to "physical therapy" in the definition of "related services" to conform to the special education definition.

All of the services set forth in the definition of "related services" are required because they have a direct relationship to the education of the child, either as a teaching tool or as a means of evaluating the child to determine his educational needs.

To the same extent, as discussed below, where school health services are provided to non-handicapped children they should also be provided to handicapped children, even though some modifications may have to be made to accommodate the unique needs of the handicapped child. However, the average school health service is nothing more than basic first aid and in some instances, simple physical examinations and immunization shots. The existence of such a health clinic should not automatically give rise to a requirement that the school must provide to handicapped children every health service which a school nurse is qualified to provide under

supervision of a physician. Further, not every school has a full-time health clinic or even a part-time nurse and yet, under the decision below, life-saving services which are capable of being provided by a nurse must be provided.

III. THE DEPARTMENT OF EDUCATION REGULATION UNDER THE ACT MAY REQUIRE NO MORE THAN THAT SCHOOLS PROVIDE TO HANDICAPPED CHILDREN THOSE "HEALTH SERVICES," IF ANY, PROVIDED TO NON-HANDICAPPED CHILDREN.

The lower court sets forth its standards as to when a "life support" service must be provided as a "related service": (1) the child must be handicapped so as to require special education; (2) the services must be required by the child during the school day; and (3) it must be one which a nurse or other qualified person can perform.

The lower court cites Department of Education regulation 45 C.F.R. 121.a13(B)(10) (now 34 C.F.R. § 300.13(b)(10)) as authority for the third part of its test. That

provision defines "related services" and states in part: "the term also includes school health services, social work services in schools, and parent counseling and training." The Department's regulation defines "school health services" as those which are "provided by a qualified school nurse or other qualified person." 34 C.F.R. § 300.13(b)(10).

It is unclear from the commentary in the regulation why the Department chose to add "school health services" to the statutory definition of "related services." Such services were not included in the earlier proposed regulation, 41 Fed. Reg. 56,977 (Dec. 30, 1976),[1] and the Department of Education removed the services from the definition in its proposed regulatory changes.

---

[1] Further, the proposed regulation defined "medical services": as "procedures performed by a licensed physician to determine a child's need for special education and related services." 41 Fed. Reg. 56,977, § 121. a.4 (n)(d) (Dec. 30, 1976).

47 Fed. Reg. 33,836 (Aug. 4, 1982). (That proposal was subsequently withdrawn.)

As discussed earlier, Congress intended to require school districts to provide to handicapped children services which are being provided to non-handicapped children, even though in the former instance it may be more difficult or more expensive. Thus, if the Department intended by its regulatory reference to "school health services" merely to assure that handicapped children would have _access_ to school health services, that requirement is authorized by the statute.

However, the effect of the lower court interpretation of the regulation is to make an _independent_ requirement that school districts must provide health services to handicapped children regardless of whether those services are also provided to non-handicapped children. If that interpretation is correct, the Department's regulation is _ultra vires_.

IV. WHILE STATE LAW SHOULD CONTROL QUESTIONS OF EDUCATIONAL METHODOLOGY, SUCH LAWS SHOULD NOT BE USED IN DEFINING STANDARDS INTENDED TO APPLY NATIONWIDE.

The district court below recognized the anomaly caused by the reliance on state law in determining whether a medical procedure is a "related service" or an exempt "medical service." 516 F. Supp. 968, 975 (1981). In matters of educational methodology we would certainly agree that state law should control. The "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 102 S. Ct. at 3051. However, in matters involving basic rights of the handicapped, there should be but one judicial standard. This is particularly true since the state laws on which the courts are to rely in this case are designed to guide medical practitioners and others as to what is or is not the practice of medicine. They are not designed to confer substantive rights.

State law should govern as to who

provides a "related service." See Comment to Department of Education Regulation 34 C.F.R. § 300.13. However, the question as to the nature of the service, i.e., whether it is a health or educational service, and, thus, whether it is required to be provided, should be answered through resort to the statute itself or its legislative history.

The identification process may even be affected if the reasoning of the lower court is to become the law of the land. At the present time handicapped children are identified by their need for specialized education. If they are now to be identified by their need for a medical service - as defined by state medical statutes - the number of handicapped children will be increased and the quality of the education services to be provided to all children may decrease.

Additionally, even though their child is being provided with an "appropriate" education

as defined in **Rowley,** parents may move from state-to-state depending on which state's regulation of the practice of medicine results in more free health services being provided by school districts in the state.

There are only so many responsibilities which society can place on school systems before their main mission - to educate - begins to be seriously jeopardized.

V. WHETHER A SERVICE IS A "RELATED SERVICE" IS NOT DEPENDENT ON THE SETTING OF THE CHILD'S PLACEMENT.

The lower court resorts to the tautological argument that because Amber Tatro's Individualized Education Program (IEP) calls for her education in the regular classroom and because she needs CIC during the school day, the school district must provide the CIC.

Since Amber needs CIC during the school day regardless of where she is placed, the issue is not where she is educated but who

pays for the CIC. Amber Tatro does not need CIC in order to be educated in a regular classroom. She needs CIC in order to live, regardless of the setting of the education.

Although Congress did evidence a preference in the Act for mainstreaming (i.e. education in the least restrictive environment, preferably the regular classroom) of handicapped children, the question of what is a "related service" does not depend on whether the child is in a regular classroom or in a separate setting. Even if the school district had determined that the appropriate setting for Amber was in a special school or institution, the district would remain liable for assuring that the child receives special education and related services, either by providing the services itself or by remaining financially responsible for the education and "related services."

VI. THIS COURT'S INTERPRETATIONS OF § 504 DO NOT REQUIRE 'HEALTH SERVICES' TO BE PROVIDED TO HANDICAPPED CHILDREN UNLESS PROVIDED TO NON-HANDICAPPED.

The courts below, in order to allow attorneys' fees to the "prevailing" plaintiffs, also found a violation of § 504 of the Rehabilitation Act of 1973. That Act provides:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... 29 U.S.C. § 794.

In the case of Southeastern Community College v. Davis, 442 U.S. 397 (1979), this Court considered its first case brought under § 504. The question in that case was how far an institution of higher education must go to accommodate the handicap of a deaf applicant to its nursing program. The Fourth Circuit had ruled that § 504 required "affirmative

conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive."

The Department of Health, Education and Welfare, in its regulation implementing § 504, requires "modifications to [a college's] academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of handicap ...." 34 C.F.R. § 104.44(A). But this Court, in **Davis**, held that:

> [i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.
>
> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Id. at 410.

The court dismissed the contention of the Government which argued in its amicus brief that § 504 requires affirmative action.

> [I]t is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirements upon an educational institution to lower or effect substantial moodifications of standards to accommodate a handicapped person. Id. at 413.

On April 20, 1981, this Court handed down an opinion in the case of **Pennhurst State School and Hospital v. Halderman,** 451 U.S. 1, 101 S. Ct. 1531 (1981), which although interpreting a law which is distinguishable from the Act at issue here, contains important language relating to interpreting the intent of Congress in passing such laws.

Plaintiffs sought the closing of Pennsylvania's Pennhurst State School and Hospital, a facility for the care and treatment of the mentally retarded, and urged that "community living arrangements" be

established for its residents. The district court held that conditions at Pennhurst violated the federal constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment," and also found violations of the Equal Protection Clause, the Eighth Amendment and § 504. Pennhurst was ordered closed and suitable "community living arrangements" provided for all Pennhurst residents. A Special Master was appointed to supervise the implementation of the order.

The court of appeals affirmed the appointment of a Special Master, but declined to reach the constitutional claims, instead resting its order on its construction of the Developmentally Disabled Assistance and Bill of Rights Act. This Act was raised on the court's own initiative; none of the Plaintiffs having raised it.

This Court in **Pennhurst** noted that the

Act in question was passed by the Congress pursuant to its Spending Power rather than under § 5 of the Fourteenth Amendment. Thus,

> the legitimacy of the Congress' power to legislate ... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' .... There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. 101 S. Ct. at 1539-40.

When the State of Texas and the Irving School District accepted funding under P.L. 94-142 and the requirement of providing a "free appropriate education," they did not knowingly accept a requirement that they must provide life-saving devices needed by each handicapped child during the school day.

The question is not, as opined by the court below, whether or not it would be burdensome for the school district to provide the service - but whether it is discriminatory

not to provide it. Should handicapped children have more rights than non-handicapped?

The comment in the Department of Education regulation under § 504 provides an interesting analysis of the duties of health institutions under § 504.

> One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness. Appendix A, Paragraph 36, Section 504 Regulation, 45 C.F.R. § 84, 42 Fed. Reg. 22,676 (May 4, 1977).

VII. THE DECISION BELOW WAS DESIGNED FOR A LARGE SUBURBAN DISTRICT, BUT WILL AFFECT ALL DISTRICTS, REGARDLESS OF SIZE AND RESOURCES.

In the fall of 1982, the Department of Education published for comment a Notice of

Proposed Rulemaking uner the Act. 47 Fed. Reg. 33,836. Section 300.4(b)(10) of that notice suggested that the provision of related services be limited to non-medical services as designated by state law. In response to that notice, amicus surveyed its member school districts in order to provide the Department with a clear picture of the problems school districts are having with the regulations as they presently stand. School districts in 19 states, with student populations ranging from nearly one million to less than 700, responded. One main theme soon became apparent in their comments -- nearly all districts expressed their dismay that, given their limited educational budgets, they are being required to take on responsibilities better placed with other social agencies. As one survey respondent stated, "Schools in [this state] have become, by default, the major social agency servicing the health,

psychological, respite and custodial care needs of children."

Should the school districts be forced to take on these multiple roles? The answer is a most definite no. It is impossible for one body to be all things to all people. In trying to solve one portion of a problem, it is important not to overlook the needs and constraints of the whole. Judicially formulated requirements pertaining to related services are one of the most difficult, if not the single most difficult, expenditure to justify to those who are complaining about the dwindling funds available for the education of all public school children.

Alternately, should it be found necessary for the schools to take on these many tasks, the decision is one best made by the state, not the judiciary. Only the state and local governments are fully aware of the myriad considerations that go into allocating scarce

fiscal resources. Judicial tampering with this allocation of responsibility and resources will only serve to upset the careful balance that states have reached, and ultimately, do more harm than good to those it is attempting to help.

Though the Irving School District is a moderately large district with about 22,000 students, and might be able to muster the necessary resources to undertake the lower court's mandate, it must be noted that it is not a typical school district. Eighty-seven percent of the 16,000 school districts in this country have less than 5,000 students, and 25% have less than 300 students. These school districts are also under the mandate of the circuit courts that have ruled that CIC and other non-educational services must be provided to students within their bounds.

Although the lower court describes CIC as a "simple procedure," assuredly non-health

personnel such as teachers and administrators will not be inclined to willingly take on such a procedure which can result in serious illness if improperly carried out. It is difficult for personnel not trained in the health professions to recognize symptoms and the failure to do so could have dire results. Further, unless all personnel in the school are trained to perform the service, the child would not have the service available when the teacher or teacher's aide is absent from school. Thus, school districts would have to assure that health professionals are available at all times. That is an expensive proposition given the fact that many schools do not have full-time nurses on staff, and, given budget cuts, many other schools are cutting back in the number of non-teaching personnel, including school nurses.

More than 86,000 facilities are currently being used in the U.S. to educate public

school students. Meanwhile, only about 30,000 school nurses are employed by public school systems. In Oconomwoco, Wisconsin for example one nurse serves 4,900 student in nine schools. Quincy, Massachusetts has 14 full-time nurses, but they must serve 12,500 students in 26 schools. Some school districts have no full-time nurses on staff and obtain emergency care from public health service agencies. W. White, "Are You Ready to Provide the Health Services Demanded of the Schools?" American School Board Journal 25 (June 1981). These smaller districts, which lack the specialized staff to perform such tasks, will incur even higher costs than those faced by Petitioner. When one considers the full range of medical services that schools, if the decision below is taken to its logical conclusion, may soon be forced to provide, the costs begin to multiply rapidly. Under the lower court decision, schools would be

obligated to provide insulin injections, kidney dialysis, and maintain tracheostomies. Colostomy, ileostomy, and uretherostomy care may be needed by students. Students may also require naso-gastric tube feedings, treatment for pressure sores, or use of a respirator during the course of the day. American Nurses Association School Nurses Working with Handicapped Children 3, (1980). In fact, courts are requiring such services at the present time. Hawaii Department of Education v. Dorr, ____ F.2d ____, No. C.A. 82-4096 slip op. (9th Cir. Nov. 7, 1983). Because of decisions such as that below, schools of education are incorporating instruction in suctioning, CIC and dispensation of medicine in special education curricula. Education should not be forced to take on roles better assumed by school nurses. School Nurses Working with Handicapped Children, supra at 4. Yet, given the dearth of school nurses, and

funds to hire them, that may be the only alternative. To provide these services, other programs -- educational programs -- will have to be sacrificed, and the original intent of the Act, to provide an education for handicapped children, will ultimately suffer.

It is not just the direct costs of providing the related services, but also the indirect burdens that attend them that concern school districts. School boards today are wide open to tort liability claims. With insurance costs already sky high, districts will now be faced with adding an additional risk -- medical services -- to the policies which try to protect them. Many may find in the long term that it is more expedient to hire medical personnel -- thus stretching tight budgets even further -- rather than face this potential liability.

Additionally, unions across the country are already beginning efforts to have

handicapped children "triple-counted" for purposes of determining class size, because of the extra time and effort these children need. Faced with the prospect of having to provide medical services, they may seek to raise this figure even higher, if indeed, their contracts will even allow them to perform medical services, a question yet to be answered. Such fears are not groundless. In at least one case, it was noted that school personnel had filed grievances charging "violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duties." See **Hawaii Department of Education v. Dorr**, 531 F. Supp. 517 (D. Hawaii 1982). These concerns do not reflect cold hearted callousness on the part of school districts and their employees, but rather legitimate fears --"fears that they could not perform the medical procedure correctly ... fear of the personal aspects of

the procedure ... and fear of being sued if something untoward occurred during the procedure." Id.

VIII. CONCLUSION

As stated by District Judge Higginbotham in the first district court opinion in this case,

> there is a temptation here to achieve a 'humane' result. Despite the limited number of times school boards may be faced with a child requiring CIC, the interpretation of these federal statutes has wide consequences because it involves definitions of the duty of hundreds of school districts to be discharged in myriad factual patterns. The limits on this court's institutional role here gives little play for this court's humanitarian concern for Amber and her parents." 481 F. Supp. 1224, 1226.

Unfortunately, the Fifth Circuit, in reversing Judge Higginbotham, stepped out of its role as interpreter of the law and into the role of policymaker. Whatever the merits of the state providing free CIC services to

Amber Tatro, there is no merit in a court twisting the language of the statute to achieve that result. The conclusion of the court of appeals to the effect that the school district is responsible under federal law for the provision of any and all health services, which can be provided by someone other than a physician and which are needed by a handicapped child during the school day, whether or not the services are educational in nature, simply has no support under either the Education for All Handicapped Children Act or § 504.

If indeed the court below had requested policy arguments on the merits of the school district providing this service, the school district may have convinced the court on policy merits alone that its precedent is inadvisable. There are limited funds available for the education of all children, handicapped and non-handicapped alike. School

districts must use great care in deciding whether to increase educational options for the children they are charged to educate or to step into other fields and attempt to use limited funds to meet other needs, such as health needs. Whatever the policy arguments may be, there is no support for the legal interpretation devised below.

Respectfully submitted,

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APPENDIX

INSTRUCTIONS FOR CATHETERIZATION OF FEMALE

PURPOSE:

To completely empty the bladder at scheduled intervals in order to decrease the incidence of urinary tract infection.

Urine that stays stagnant in the bladder is more likely to become infected. A bladder that stays full becomes enlarged and thickened.

Scheduled emptying of the bladder allows the patient to become familiar with the difference in the sensation of a full bladder and an empty bladder.

EQUIPMENT NEEDED:

Clean catheter, metal or rubber. (Metal is best since it can be boiled repeatedly without deterioration.)
Soap and Water.
Dish to catch the urine, for example, a re-usable jar.
Large underpad, to prevent soaking bed linens.

GENERAL INSTRUCTIONS:

1. Wash hands with soap and water.

2. Get all of the equipment ready.

3. Get child ready. (If possible, put at table height since it is easier to do this procedure at this height.) Place child on her back.

GENERAL INSTRUCTION (continued):

4. Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction. (Never wash in an upward direction since this will move germs from around the rectum up into the area of the bladder opening.)

5. Insert catheter in urethra and let all urine drain out of the bladder. This may take longer than you think, so do not remove catheter until the urine has stopped draining.

6. f you are unable to catheterize, contact your local Public Health Nurse or call Texas Scottish Rite Hospital.

7. Discard urine.

8. Clean catheter. Clean with soap and warm water after each use. Allow to dry and place in a clean, dry envelope.

At least once a day after the catheter has been washed with soap and water, place it in a pot of water and boil for 20 minutes. Allow the catheter to air dry and place it in a clean dry envelope.

MOTION FILED
MAR 26 1984

NO. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, Individually,
and as Next Friend of AMBER TATRO,
a Minor,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

HENRI and MARY TATRO, Individually and as Next Friend of AMBER TATRO, a Minor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate 1/ (hereinafter Department) respectfully moves this Court for leave to file the attached brief as amicus curiae in this case. The consent of the petitioner school district was requested but refused; respondents, however, consented to filing.

The Department provides legal representation to protect and advocate the rights of the developmentally disabled and other handicapped persons through its Division of Advocacy for the Developmentally Disabled 2/ (hereinafter DADD). In addition, DADD is

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1. The Department, a cabinet level agency of New Jersey state government, N.J.S.A. 52:27E-2, is empowered to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest" N.J.S.A. 52:27E-29.

2. DADD is vested with a state mandate to provide legal representation and other advocacy services to protect the rights of developmentally disabled persons and other handicapped persons found to have needs similar to the developmentally disabled. N.J.S.A. 52:27E-41.4.

designated to protect and advocate the rights of developmentally disabled persons pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 et seq. DADD has participated in various proceedings involving the rights of the developmentally disabled relating to special education, 3/ medical treatment, 4/ and community

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3. The Department, through DADD, has assisted hundreds of children in administrative and judicial reviews of the adequacy of special education programs pursuant to N.J.S.A. 18A: 46-1 et seq. See, e.g., East Windsor Bd. of Ed. v. Diamond, No. 83-2364 (D. N.J. 1983); Wall Twp. Bd. of Ed. v. Watts, No. 83-4972 (D. N.J. 1983); and Bd. of Ed. of City of Paterson v. City Council of Paterson, No. L-03814-81 (N.J. Super. Ct., Law Div. 1982).

4. The Department joined an amicus brief before this Court in Pennhurst State School v. Halderman, 451 U.S. 1 (1981). See also, the Public Advocate's participation as party intervenor in In the Matter of Claire C. Conroy, 188 N.J. Super. 523 (Chan. Div.), rev'd 190 N.J. Super. 453, cert. granted __ N.J. __ (1983); In the Matter of Lee Ann Grady, 85 N.J. 235, 426 A. 2d 467 (1981), and as amicus curiae in State of N.J. v. Levine, 84 N.J. 234, 418 A. 2d 229 (1980).

residences. 5/

The interest of the Department in this case arises from its frequent experience with special education and other issues affecting the developmentally disabled citizen of the State of New Jersey, its federal and state mandate to protect the rights of the developmentally disabled people in this State, including the right to a free, appropriate public education to respondent Amber Tatro and many of the other handicapped children who stand to be affected by the outcome of this case. 42 U.S.C. §6001 (7); N.J.S.A. 52:27E-44.3; N.J.S.A. 30:6D-3.

The Department appears as amicus curiae 6/ to address several fundamental

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5. See, e.g., Maahsen v. Rudderow, No. C-4762-81 (N.J. Super. Ct., Chan. Div. 1983) involving the Public Advocate as party intervenor.

6. In addition to the cases already mentioned, the Department has participated before this Court as amicus in a number of other cases. See, e.g., United Building and

(footnote cont'd on next page)

aspects of special education analysis which have not as yet been addressed by the parties before the Court: (1) the Congressional intent to require that related services such as CIC be provided so that handicapped children could be educated in the regular educational environment, particularly as it relates to (2) the considerable societal and individual benefits of mainstreaming children with disabilities into regular classrooms, and the fact that prior to the enactment of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., many obstacles barred implementation of this concept.

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6. (cont'd from page 4) Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, __ U.S. __, 52 U.S.L.W. 4187 (February 21, 1984); Silkwood v. The Kerr-McGee Corp., __ U.S. __, 52 U.S.L.W. 4043 (January 11, 1984); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

HENRI and MARY TATRO, Individually and as Next Friend of AMBER TATRO, a Minor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE OF THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE IN SUPPORT OF RESPONDENTS

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Mills v. Bd. of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972 ..... 25, 42

Mt. Laurel Twp. v. Dept. of the Public Advocate, 83

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Education for All Handicapped Children Act of 1975, Pub. L. 94-142, §1, 9 Stat. 775 (1975), 20 U.S.C. §1401 et seq.	passim
Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484 (1974)	29
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121 Cong. Rec. 19492 (1975)	36
121 Cong. Rec. 23706 (1975)	20, 26
121 Cong. Rec. 25540 (1975)	20
H.R. Rep. No. 332, 94th Cong., 1st Sess. 9 reprinted in 1975 U.S. Code Cong. & Ad. News 1425	20
H.R. Rep. No. 332, 94th Cong., 1st Sess. 17 (1975)	21
H.R. Rep. No. 380, 93rd Cong., 2nd Sess. reprinted in 1974 U.S. Code Cong. & Ad. News 4141	29
H.R. Rep. No. 664, 94th Cong., 1st Sess. 30 (1975)	20, 21
H.R. Rep. No. 664, 94th Cong., 1st Sess. 45 (1975)	30
S. Rep. No. 168, 94th Cong., 1st Sess. 8 reprinted in 1975 U.S. Code Cong. & Ad. News 1425	19, 21
S. Rep. No. 168, 94th Cong., 1st Sess. 27 reprinted in 1975 U.S. Code Cong. & Ad. News 1425	25

TABLE OF AUTHORITIES (cont'd)

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S. Rep. No. 168, 94th Cong., 1st Sess. 48 reprinted in 1975 U.S. Code Cong. & Ad. News 1425 20

OTHER AUTHORITIES

Abelson, "Measuring Preschool's Readiness to Mainstream Handicapped Children," 55 Child Welfare 216 (1976) 54

Berry, "The Exceptional Child in Regular Classes," 3 J. Exceptional Children 15 (1936) 43

Bricker, "A Rationale for the Integration of Handicapped and Nonhandicapped Preschool Children," Early Intervention and the Integration of Handicapped and Nonhandicapped Children 3 (1978) 39, 57

Cantrell & Cantrell, "Preventive Mainstreaming: Impact of a Support Services Program on Pupils," 42 Exceptional Children 137 (1976) 55

Challman, "Mental Health in Special Classes," 8 J. Exceptional Children 42 (1941) 43

Council for Exceptional Children, "Definition of

TABLE OF AUTHORITIES (cont'd)

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Mainstreaming," 43 Exceptional Children 43 (1976) 47

Council for Exceptional Children, "The Organization and Administration of Special Education -- A CEC Policy Statement," 40 Exceptional Children 70 (1973) 47

Deno, "Special Education as Developmental Capital," 37 Exceptional Children 229 (1970) 45

Dewey, "Social Status of Physically Handicapped Children," 23 Exceptional Children 104 (1956) 44

Dunn, "Special Education for the Mildly Retarded -- Is Much of It Justifiable?" 35 Exceptional Children 5 (1968) 46

Ford, "Project Helping Hand: Innovative Special Education Service for a Rural Area," in U.S. Dept. of Health, Education and Welfare, Innovations in Special Education 33 (1972) 48

Griffin & Karselis, Physical Agents for Physical Therapists (2d ed. 1982) 23

TABLE OF AUTHORITIES (cont'd)

Page

Guralnick, "Integrated Preschools as Educational and Therapeutic Environments," in Guralnick, ed., Early Intervention and the Integration of Handicapped and Nonhandicapped Children 115 (1978) 60

Guralnick, "The Value of Integrating Handicapped and Nonhandicapped Preschool Children," 46 Am. J. Orthopsych. 236 (1976) .. 41

Haggerty & Sacks, "Education of the Handicapped: Towards a Definition of an Appropriate Education," 50 Temp. L. Q. 961 (1977) 37, 54

Hartup, "Peer Interaction and the Process of Socialization," in Guralnick, ed., Early Intervention and the Integration of Handicapped and Nonhandicapped Children 27 (1978) 39

Hefferman, "Meeting the Needs of Exceptional Children in Rural Schools," 2 J. Exceptional Children 49 (1935) 43

Kakalik, et al., The Cost of Special Education 37 (1981) 58

Keogh, "What Research Tells Us About Mainstreaming," 33 in O'Donnell & Bradfield, eds., Mainstreaming: Controversy and Consensus (1976) 54

TABLE OF AUTHORITIES (cont'd)

Page

Kurzman, Hearings on S. 896 and S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. 453 (1973) 49

Linder, Early Childhood Special Education (1983) 57

Malloy, "The Changing Mandate for Special Education," 40 The Education Digest 6 (1975) 47

Martin, "Some Thoughts on Mainstreaming," 41 Exceptional Children 150 (1974) 47

National Advisory Committee on the Handicapped, "1974 Annual Report," First Class Citizenship for Handicapped People (1974) 48

National Advisory Committee on the Handicapped, Full Educational Opportunity Under the Law (1975) 50

National Advisory Committee on Handicapped Children, Basic Education Rights for the Handicapped (1973) 49

National Advisory Committee on Handicapped Children, Third Annual Report (1970) 48

TABLE OF AUTHORITIES (cont'd)

Page

National Education Association, A Study Report: Education for All Handicapped Children: Consensus, Conflict, and Challenge (1978) 57

National School Boards Association, A Survey of Special Education Costs in Local School Districts (1979) 47

Nordquist, "A Behavioral Approach to the Analyses of Peer Intervention," Early Intervention and the Integration of Handicapped and Nonhandicapped Children 53 (1978) 39

President's Committee on Mental Retardation, Mental Retardation Past and Present (1977) . 51, 53

Reynolds, "A Framework for Considering Some Issues in Special Education," 28 Exceptional Children 367 (1962) 44

Reynolds & Rosen, "Special Education: Past, Present and Future," reprinted in Special Learning Corp., Exceptional Children: A Reference Book 3 (1978) 52, 60

Robb, "Segregation versus Nonsegregation of Exceptional Children," 12 J. Exceptional Children 235 (1946) 44

TABLE OF AUTHORITIES (cont'd)

Page

Ruhl, "Mainstreaming," in Schmid & Nagata, eds., Contemporary Issues in Special Education 2 (1983) 41,52,54

Scheerenberger, A History of Mental Retardation 167 (1983) 42

Shestack, Handbook of Physical Therapy 196 (3d ed. 1977) 23

Snell, "Physical Therapy" in Cruickshank, ed., Cerebral Palsy: A Developmental Disability (3d rev. ed. 1976) .. 3

Tenny, "Adjustment of Special Class Pupils to Regular Classes," 10 J. Exceptional Children 139 (1944) 43

Tenny, "The Minority Status of the Handicapped," 20 Exceptional Children 260 (1953) 44

U.S. Dept. of Health, Education and Welfare, Progress Toward a Free Appropriate Education, A Report to Congress on the Implementation of 94-142, The Education for All Handicapped Children Act (1979) 57

Voekler, "Organization, Administration, and Supervision of Special Education Programs," in Cruickshank & Johnson, eds., Education of Exceptional Children and Youth 659 (3d ed. 1975) 45

TABLE OF AUTHORITIES (cont'd)

Page

Weintraub & Abelson, "Appropriate Education for All Handicapped Children: A Growing Issue," 23 Syracuse L. Rev. 1037 (1972) ... 55

Wolfenberger, Normalization (1972) 47

Ziegler, "Integration of Young, Trainable, Mentally Retarded Children into Regular Elementary School," 42 Exceptional Children 184 (1976) 40

STATEMENT OF INTEREST

The New Jersey Department of the Public Advocate was created in 1974 as an independent and unique cabinet-level agency of New Jersey state government to provide legal representation and other advocacy services affecting the public interest. N.J.S.A. 52:27E-29. 1/ The Department, through its Division of Advocacy for the Developmentally Disabled (hereinafter DADD) is vested with the responsibility to protect and advocate the rights of developmentally disabled and other handicapped persons in New Jersey. In addition, by designation of the Governor, the Department has the responsibility to protect and advocate for the rights of developmentally

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1. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws, and other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30.

disabled persons pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 et seq.

To this end, the Department has, inter alia, participated in various proceedings involving the rights of the developmentally disabled relating to special education, 2/ medical treatment, 3/ and community

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2. The Department, through DADD, has assisted nearly 1000 children in obtaining appropriate educational services under the federal Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. In 1983, the Division represented 217 children in such matters. Among those currently in litigation are East Windsor Bd. of Ed. v. Diamond, No. 83-2364 (D. N.J. 1983) and Wall Twp. Bd. of Ed. v. Watts, No. 83-4972 (D. N.J. 1983). See also, Bd. of Ed. of City of Paterson v. City Council of Paterson, No. L-03814-81 (N.J. Super. Ct., Law Div. 1982) wherein the Public Advocate participated in enforcing a city's financial obligation under the thorough and efficient education clause of the State Constitution.

3. DADD joined in an amicus brief before this Court in Pennhurst State School v. Halderman, 451 U.S. 1 (1981). See also, the Public Advocate's participation as party intervenor In the Matter of Claire C. Conroy, 188 N.J. Super. 523 (Chan. Div. 1983), rev'd 190 N.J. Super. 453 (App. Div. 1983), cert. granted (footnote cont'd on next page)

residences. 4/ The important role of the Department as a representative of the public interest has been frequently acknowledged. 5/

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3. (cont'd from page 3) __ N.J. __ (1983) involving the removal of a nasogastric tube of an 84-year-old woman suffering from organic brain syndrome and In the Matter of Lee Ann Grady, 85 N.J. 235, 426 A. 2d 467 (1981) involving the sterilization of a mentally retarded individual, and as amicus curiae in State of N.J. v. Levine, 84 N.J. 234, 418 A. 2d 229 (1980).

4. See Maahsen v. Rudderow, No. C-4762-81 (N.J. Super. Ct., Chan. Div. 1983) where the Public Advocate was granted leave to participate as party intervenor in a case involving the right of developmentally disabled persons to establish community residences based upon federal and state policy that services to persons with developmental disabilities should be provided in the least restrictive environment consistent with the respective needs of those individuals.

5. Recently, for example, the Supreme Court of the State of New Jersey characterized the Department as a "shining example of that commitment [by the government to the public interest]", Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A. 2d 886, 893 (1980), and of "admirably further-[ing] the principles embodied in our Constitution", id. at 536, 416 A. 2d at 893, as it fulfills the role of "nourishing and revitalizing our political system", id. The Department has participated before the Court (foootnote cont'd on next page)

Generally, this case presents the question of whether handicapped children are entitled to clean intermittent catheterization (CIC) as a related service, within the meaning of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. (hereinafter EAHCA), necessary to assist them in benefitting from special education, and whether the provision of CIC by a school district is otherwise mandated pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which bars discrimination against handicapped persons in federally funded programs. The interest of the Department in this case arises from its frequent experience

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5. (cont'd from page 4) as amicus curiae in several cases other than those already mentioned. See, e.g., United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, __ U.S. __, 52 U.S.L.W. 4187 (February 21, 1984); Silkwood v. The Kerr-McGee Corp., __ U.S. __, 52 U.S.L.W. 4043 (January 11, 1984); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

with special education and other issues affecting the developmentally disabled citizens of the State of New Jersey and the obligation of the Department pursuant to its federal and state mandate to further and protect the rights of the developmentally disabled in this State, including the right to a free, appropriate public education. Respondent Amber Tatro and many of the other handicapped children who stand to be affected by the outcome of this case are developmentally disabled. 42 U.S.C. §6001 (7); N.J.S.A. 52:27E-44.3; N.J.S.A. 30:6D-3.

The Department appears as amicus curiae to address several fundamental aspects of special education analyses: (1) the Congressional intent to require that related services such as CIC be provided so that handicapped children could be educated in the regular educational environment, and (2) the considerable societal and individual benefits

of mainstreaming children with disabilities into regular classrooms, and the fact that prior to the enactment of EAHCA, many obstacles barred implementation of this concept.

STATEMENT OF THE CASE

Respondent Amber Tatro (hereinafter Amber) is a child affected by myelo-meningocele, commonly known as spina bifida, which, among other things, necessitates that a procedure known as clean intermittent catheterization (CIC) be administered to her once every three or four hours. Tatro v. State of Texas, 481 F. Supp. 1224, 1226 (N.D. Tex. 1979) (hereinafter Tatro I).

In 1979, Amber's parents requested from petitioner an appropriate special education program for Amber, who has orthopedic and speech impairments in addition to the neurogenic bladder condition which makes CIC

necessary. Tatro v. State of Texas, 516 F. Supp. 968, 971 (N.D. Tex. 1981) (hereinafter Tatro II). The school district agreed to place Amber, who was then three years old, in its Early Childhood Development Classes but would not agree to provide her with CIC during the school day. Id. Subsequent administrative hearings initiated by the Tatros resulted in determinations by both a hearing officer and the State Commissioner of Education that petitioner was required to provide CIC. Id. These determinations, however, were reversed by the State Board of Education. Id.

Subsequently, Amber's parents, respondents Henri and Mary Tatro, filed pursuant to 20 U.S.C. §1415 an action in the United States District Court for the Northern District of Texas seeking injunctive relief and damages. The District Court denied the Tatro's motion for a preliminary injunction.

Tatro I, supra. On appeal, the United States Court of Appeals for the Fifth Circuit considered the application of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., to the facts of the case, and held that "without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." Tatro v. State of Texas, 625 F. 2d 557, 562 (5th Cir. 1980). The Court thus held that EAHCA "must be read literally to include the provision of CIC to Amber Tatro," id. at 564 (footnote omitted), and also held that respondent's failure to provide CIC violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Id. at 564-65. The case was accordingly remanded to the District Court. Id. at 565.

On remand, the District Court rejected the school district's argument that CIC was a

medical service which, under 20 U.S.C. §1401 (17), the school system was not required to provide. Tatro II, supra, 516 F. Supp. at 975-77. The Court ordered the school district to modify Amber's individualized education plan (hereinafter IEP) to provide for CIC. Id. at 977.

On appeal of Tatro II, the Fifth Circuit, guided by its reading of EAHCA's related services provision in Tatro I, upheld the District Court's determination that CIC is not medical treatment within the meaning of 20 U.S.C. §1401 (17). Tatro v. Texas, 703 F. 2d 823, 827-29 (5th Cir. 1983). The Court also rejected the school district's argument that provision of home instruction to Amber would comply with the requirement of EAHCA that a free, appropriate public education be provided. The Court noted that Amber's IEP (jointly developed by respondents and petitioner) provided for instruction at

school, not at home, and must be followed unless circumstances warranted its modification. Id. at 830-31. The Court therefore affirmed the judgment of the District Court in Tatro II.

The school district applied to the Fifth Circuit for a rehearing en banc. That request was denied, and the district then petitioned this Court for a Writ of Certiorari, which was granted on December 5, 1983.

SUMMARY OF ARGUMENT

The Education for All Handicapped Children Act requires that handicapped children be educated in classes with nonhandicapped children, except when instruction "in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412 (5). In the present case, the individualized education plan, prepared jointly by the school

district and the parents, provides for the child's attendance in a regular second grade class. Since Amber cannot attend that class without CIC, it is a supplementary aid or service which §1412 (5) indicates Congress intended be provided.

Congressional intent to require the process discussed above of "mainstreaming" handicapped children into classes with nonhandicapped children by providing necessary supplemental services is demonstrated by extensive discussion in EAHCA's legislative history. The Congressional focus on providing services necessary to permit attendance in classes with nonhandicapped children is also demonstrated by the inclusion in EAHCA of various ancillary provisions favoring mainstreaming, particularly several which relate not to direct educational services but only to access. These include the requirement that handicapped children be transported to

school, 20 U.S.C. §1401 (17), and provisions for making school buildings physically accessible to children with disabilities, 20 U.S.C. §1406.

At the time EAHCA was enacted, the many benefits of mainstreaming had long been recognized by the education profession but had not been implemented due to prejudice, inertia, and bureaucratic difficulties. These benefits include more positive attitudes of handicapped and nonhandicapped pupils toward one another, more positive self-images on the part of handicapped children, and greater educational achievement by children with disabilities. The effect of EAHCA was to overcome historical obstacles to mainstreaming and make possible the realization of its economic and educational benefits.

LEGAL ARGUMENT

POINT I

THE DECISION BELOW AFFIRMS THE CONGRESSIONAL PURPOSE OF PROVIDING RELATED SERVICES TO ENABLE HANDICAPPED CHILDREN TO BE EDUCATED IN THE REGULAR EDUCATIONAL ENVIRONMENT WHENEVER FEASIBLE.

A. Petitioner School District Acknowledged in the Child's Individualized Education Plan That It Is Educationally Feasible for Her to Attend Regular Classes.

To insure that the mandate of the Education for the Handicapped Act requiring the provision of a free appropriate public education to handicapped children would be fulfilled, Congress relied heavily upon certain procedural requirements including development of an individualized education plan (IEP). Rowley v. Board of Education, 458

U.S. 176, 189 (1982). Among other things, the IEP must include a "statement . . . of the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. §1401 (19)(C). Thus, the IEP must specify how the child's school district intends to meet the requirement that "special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412 (5) (emphasis supplied).

In the case at bar, the result of this process has been a determination that respondent's placement in one of the school district's regular second grade classes would meet this requirement, as well as others necessary to provide her with the free appropriate public education mandated by the

Act. 6/ More specifically, the IEP provides for Amber to attend the regular second grade class for the bulk of each school day with approximately one hour in a resource room for special help.

The petitioner school district was, as required by the statutory scheme, one of the parties which agreed to that determination. See 20 U.S.C. §1401 (19). In fact, it was the school district's own staff which developed the IEP. The petitioner was aware at that time of Amber's need for clean intermittent catheterization (CIC) and did not view it as preventing her education in a regular class. See Tatro II, 516 F. Supp. at 971-72. 7/ Events have proved that view correct, as Amber successfully attended a regular first grade class and now attends a regular second grade

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6. The individualized education plan for respondent which reflects this determination is reproduced in respondent's appendix.

7. Petitioner did, of course, dispute whether the CIC was to be provided by it.

class. See Brief of Respondent at 1-2 n.2. Accordingly, there is no question that Amber can be educated in a regular class. Under the provisions of 20 U.S.C. §1412 (5), supra, she cannot be removed from that class without contravening the intent of Congress. As this Court held in Rowley, "[t]he Act requires participating states to educate handicapped children with nonhandicapped children whenever possible," 458 U.S. at 202, meaning in all cases except when "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id. n.24, quoting 20 U.S.C. §1412 (5). As will be shown below, Congress intended that the States and local school districts provide incidental services when necessary to permit attendance in regular classes. In this case, the mutually agreed upon IEP requires that Amber be educated in a regular classroom. Since this cannot be accomplished without CIC, that service falls squarely within the

Congressional mandate.

B. Congress Required That States and Local School Districts Provide Incidental Services to Handicapped Children to Assure Them the Benefits of "Mainstreaming" into Regular Classes.

As noted above, section 612 (5) of EAHCA, 8/ 20 U.S.C. §1412 (5), requires states receiving funds under that Act to assure that "removal of handicapped children from the regular educational environment occurs only when the nature and severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This provision reflects a Congressional

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8. This brief follows the usage of the decision below which employs the term EAHCA as a generic reference to special education statutes codified at 20 U.S.C. §1401 et seq. See Tatro v. Texas, 703 F. 2d 823, 825. Strictly speaking, however, EAHCA refers to the 1975 amendment to those provisions. See, Education for All Handicapped Children Act of 1975, Pub. L. 94-142, §1, 9 Stat. 775 (1975).

concern that handicapped children attend classes with nonhandicapped children except when educationally not feasible. As the Senate Report on the bill which became Pub. L. 94-142 -- the 1975 amendments to EAHCA -- reiterates:

> The Education Amendments of 1974 added important new provisions to the Education of the Handicapped Act which require the States to establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

S. Rep. No. 168, 94th Cong., 1st Sess. 8 reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1432 (emphasis added).

The legislative history of EAHCA is, in fact, pervaded by specific expressions of the intent that, absent clear educational reasons to the contrary, handicapped children attend regular classrooms. These references occur in the Committee reports of both houses. H.R. Rep. No. 332, 94th Cong., 1st Sess. 9, 15; S. Rep. No. 168, 94th Cong., 1st Sess. 48, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1501 (among rights to be protected is right of "every handicapped child [to be] educated in the least restrictive environment"); H.R. Rep. No. 664, 94th Cong., 1st Sess. 30 (1975); and S. Rep. No. 168, supra, at 8. They also occur throughout the floor debate in both houses. 121 Cong. Rec. 19485 (1975); 121 Cong. Rec. 25540 (1975); 121 Cong. Rec. 23706 (1975); and 121 Cong. Rec. 19484 (1975).

These expressions of Congressional purpose not only make clear the intent that handicapped children attend regular classes,

but also that special services be provided when necessary to accomplish that goal. Thus, the House Conference Report notes that "to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature and severity of the handicap is such that education in regular classes with the use of supplementary aids and suportive services cannot be achieved satisfactorily." H.R. Rep. No. 664, 94th Cong., 1st Sess. 30 (1975). Accord, S. Rep. No. 168, 94th Cong., 1st Sess. 8, 47 (1975). Moreover, the House Conference Report further notes that one requirement of the House bill would place a mandate on local school districts for the "provision of special services to enable handicapped children to participate in regular educational programs." Id. at 42; accord, H.R. Rep. No. 332, 94th

Cong., 1st Sess. 17 (1975) (one prerequisite to local funding allocation is assurance that special education be provided to all handicapped children in "least restrictive" educational setting). This provision was incorporated into the final statute without significant change. See id. at 44; 20 U.S.C. §1414 (a)(1)(C)(iv).

If the requirement that local school districts provide special services for the purpose of enabling handicapped children to participate in regular education programs means anything, it must mean that a service as quick, simple, and nondisruptive as CIC is to be provided. 9/ Unlike CIC, many of the

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9. The Court of Appeals described the procedure as follows:

> CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clean; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the

(footnote cont'd on next page)

other services which have clearly been mandated by Congress, see 20 U.S.C. §1401 (17), may require elaborate equipment (e.g., physical therapy 10/) or highly trained personnel (e.g., occupational and speech therapy).

Perhaps most significant, however, is the specific Congressional mandate that transportation be provided as a related service. Id. Unlike therapy services, the sole function of transportation is to enable the child to attend school. Thus, even if the value of CIC as self-care education is

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9. (cont'd from page 20) catheter is withdrawn; and the amount of urine collected is measured and noted. Tatro v. Texas, 625 F. 2d 557, 559 n.3 (5th Cir. 1980).

10. See, e.g., E. Snell, "Physical Therapy" in W. M. Cruickshank, ed., Cerebral Palsy: A Developmental Disability 335 (3d rev. ed. 1976); R. Shestack, Handbook of Physical Therapy, 196 (3d ed. 1977); J. Griffin & T. Karselis, Physical Agents for Physical Therapists, 2d ed. (1982).

completely discounted, it is -- like transportation -- a service which is clearly within the Congressional intent that services necessary to enable handicapped children to attend regular educational programs be provided.

Thus, the legislative history demonstrates a Congressional commitment to educating handicapped children in regular classes whenever that could be made possible by providing related or supplemental services. The Congressional concern with this issue was based not only upon recognition of the increased effectiveness of education in a regular class, see pp. 37-41, infra, but also upon a need for special efforts to overcome a history of exclusion of handicapped children from regular classes (and sometimes from all classes). The Senate Committee Report noted that identification of a person as having a disability "has too often meant separation, discriminatory treatment, and a reason for

failing to provide any services at all." S. Rep. No. 168, 94th Cong., 1st Sess. 27 reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1451. 11/ Thus, the Congressional concern was as much with insuring placement in regular classes whenever possible as with preventing total exclusion from educational services.

As a reflection of the importance which Congress attached to "mainstreaming" handicapped children into regular classes, EAHCA includes several ancillary provisions designed to foster accomplishment of that

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11. Similarly, in discussing the precedent-setting cases of Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and Mills v. Bd. of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972), the Committee quoted language from the court's order in Mills which prohibited exclusion "from a regular public school assignment" unless the child was provided with both "adequate alternative educational services" and "prior hearing and periodic review" of the educational program provided. Id. at 6, reprinted in 1975 U.S. Code Cong. & Ad. News at 1430 (emphasis added).

objective. For example, 20 U.S.C. §1406 authorizes federal grants to State or local educational agencies for the removal of architectural barriers which might prevent a physically disabled child from attending regular classes. See 121 Cong. Rec. 23706 (1975) (statement of Representative Perkins, Chairman of Committee on Education and Labor, noting that bill provided for "removal of architectural barriers so that children with handicapping conditions may attend the same schools which children without such handicaps may attend"). These grants would be in addition to the broader program of federal funding to accomplish the general purposes of the Act, set out at 20 U.S.C. §1411.

Thus, Congress not only provided for broad federal funding to enable States and localities to accomplish EAHCA's purposes, including provision of special services such as transportation to permit mainstreaming handicapped children into regular classes, but

also saw mainstreaming as of such importance that it provided funds for physical alteration of buildings when needed to accomplish that goal. Like transportation, removing architectural barriers is solely access related; it provides no direct educational service. Thus, the specific Congressional concern with removing physical barriers strongly reinforces its general concern with mainstreaming handicapped children into regular classes.

This concern with physical barriers finds a direct analogy in the facts of this case. While provision of a simple, routine service such as CIC is not comparable to making physical building renovations, they have similar effects on handicapped pupils' attendance in regular classes. As Senator Stafford, one of the primary sponsors of EAHCA and ranking minority member of the Subcommittee on the Handicapped, pointed out:

> For far too long handicapped children have been denied access to the regular school system because of an inability to climb the steps to the schoolhouse door, and not for any other reason. This has led to segregated classes for those children with physical handicaps. This is an isolation that is in many cases unnecessary. It is an isolation for the handicapped child and for the "normal" child as well. The sooner we are able to bring the two together, the more likely that the attitudes of each toward one another will change for the better.

121 Cong. Rec. 19484 (1975) (emphasis added). For Amber, the "inability to climb the steps to the schoolhouse door" is the unavailability of someone to provide CIC until she is old enough to do it herself.

Another ancillary provision of EAHCA which demonstrates the Congressional commitment to mainstreaming is found in 20 U.S.C. §1418 (b)(1)(C) which directs federal education officials to collect data "necessary for the implementation of this subchapter"

including the number of handicapped children participating in regular educational programs and the number who are attending programs other than the regular education environment. The pervasive concern with maximizing attendance of handicapped children in regular classes has appeared in a number of other contexts as well. With respect to early education programs, for example, the House Committee report concerning the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484 (1974), noted that programs for younger handicapped children have the effect not only of preventing secondary problems but also of "enhancing their ability to enter the educational mainstream." H.R. Rep. No. 380, 93rd Cong., 2nd Sess. reprinted in 1974 U.S. Code Cong. & Ad. News 4141. The mainstreaming issue was also addressed in the context of a provision to allow state agencies under certain circumstances to provide education to handicapped children, including services in

State and regional centers (see 20 U.S.C. §1414 (d)). In fact, it was the only issue which the House Conference Report raised in connection with that provision:

> With respect to the provision allowing the State educational agency, under specified conditions, to use the local educational agency allotment to serve handicapped children directly in such manner and at such location (including State and regional centers) consistent with the provisions of the Act, conferees specifically point out that serving children in State or regional centers must be done consistent with provisions of existing law which require that to the maximum extent appropriate, handicapped children are educated with nonhandicapped children, and special classes, separate schooling, or other removal from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

H.R. Rep. No. 664, 94th Cong., 1st Sess. 45 (1975) (emphasis added).

In short, the Congressional intent that

handicapped children be "mainstreamed" into regular classrooms appears not only in the general mandate of 20 U.S.C. §1412 (5) (requiring States receiving assistance under EAHCA to assure that handicapped children attend the regular educational environment except when education in such classes with the use of supplementary services cannot be achieved satisfactorily), but also in a wide range of more specific contexts. These repeated references clearly demonstrate that provision of supplementary aids and services to enable handicapped children to attend regular classes was a major Congressional concern in the enactment of EAHCA.

This does not mean that Congress intended to require that a school district provide every service needed by a handicapped child. The Congressional concern focuses on services which are appropriate to enable the child to benefit from special education, Rowley v. Bd. of Education, supra, 458 U.S. at

189, or to facilitate attendance in the least restrictive, appropriate educational program as determined in the mutually agreed-upon IEP.

Thus, if it were not necessary for Amber to receive CIC during the school day, CIC would not be required to enable her to benefit from special education and therefore would not be a related service under 20 U.S.C. §1401 (17); nor under such circumstances would it be a supplementary aid or service necessary under 20 U.S.C. §1412 (5) to prevent her exclusion from the regular educational environment. In addition, if CIC were a complicated medical procedure rather than a simple task, requiring only a clean metal tube (see 516 F. Supp. at 970 n.1), and easily learned in less than one hour (516 F. Supp. at 974) and which Amber will soon be able to perform on her own (id.), it would similarly be excluded as a related service. 20 U.S.C. §1401 (17). Such services as kidney dialysis are clearly distinguishable from CIC on either

of the foregoing bases. 12/

In short, the clearly expressed Congressional intent to require that services such as CIC be provided to enable handicapped children to attend regular classes can be satisfied without undue expense to local school districts. 13/ In enacting the

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12. CIC is clearly much closer to diapering than it is to dialysis. In this amicus' State, the State education agency mandates that programs for educationally handicapped preschool children include a "diapering area as needed in the classroom with facilities for the sanitary disposal of soiled diapers." 15 N.J.R. 747 (1983), to be codified at N.J.A.C. 6:28-2.3(a)(3).

13. In a telephone survey conducted under the supervision of Professor Herbert Semmel of the Yeshiva University Cardozo School of Law, the state boards of education in every state were asked whether CIC was considered to be a "related service" in their state. Thirteen states responded, all in the affirmative, indicating that there is a general policy nationally of recognizing CIC to be a service provided by the public schools when necessary for a handicapped child to benefit from special education. The staff who responded to the survey were:

Arizona - Shirley Bowman, Education Program Specialist for the Federal Projects
California - Bob Evans, Consultant, Special Education and Assistant to the Director

(footnote cont'd on next page)

requirement that handicapped children be "mainstreamed" into regular classes, Congress was motivated by the considerable benefits of placing children with disabilities into regular classrooms:

> I firmly believe that if we are to teach all of our

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13. (cont'd from page 33)
of Special Education
Florida - Dr. Wendy Cullar, Director of Exceptional Students
New Hampshire - Robert Kennedy, Director of Special Education Section
Kentucky - Lynette Uhl, Director of Unit of Procedural Safeguards
Illinois - Betty Endicott, Special Education Specialist
Minnesota - Marilyn Sorenson, Education Specialist
Mississippi - Carolyn McGuire, Assistant Program Supervisor, Special Ed Section
Montana - Gail Gray, Director of Special Education
New Jersey - Mari Molenaar, Planning Associate, Division of Special Education
North Carolina - Beverly Gardner, Secretary of Related Services
North Dakota - Shelby Niebergall, Assistant Director of Special Education
Oklahoma - Glenn Haring, Assistant Officer for Procedural Safeguards, Special Education Section
Wisconsin - Dr. Betty Ross-Thompson, Supervisor of Special Physical and Other Health Impairments, Department of Education

> children to love and understand each other, we must give them every opportunity to see what "different" children are like.
>
> If we allow and, indeed, encourage handicapped children and nonhandicapped children to be educated together as early as possible, their attitudes toward each other in later life will not be such obstacles to overcome. A child who goes to school everyday with another child who is confined to a wheelchair will understand far better in later life the limitations and abilities of such an individual when he or she is asked to work with, or is in a position to hire, such an individual.

121 Cong. Rec. 19484 (1975) (remarks of Senator Stafford).

> . . . Failure to provide appropriate educational services for all handicapped children results in public agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles. Yet, providing appropriate educational services now means that many of these indivi-

> duals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds. The time, I hope, has come when we look no longer upon persons with disabilities as charitable objects, unable to make significant contributions. Action on this legislation will establish a public policy which will break the chain of ignorance once and for all.

121 Cong. Rec. 19492 (1975) (remarks of Senator Williams).

In short, mainstreaming provides extensive societal and individual benefits, which Congress determined, more than justify the comparatively small incremental expense of providing access to regular education classes. These benefits will be discussed in greater detail in Point II of this brief.

POINT II

ALTHOUGH THE BENEFITS OF MAINSTREAMING HANDICAPPED CHILDREN HAVE LONG BEEN RECOGNIZED, UNTIL THE ENACTMENT OF EAHCA MANY OBSTACLES BARRED IMPLEMENTATION OF THIS CONCEPT.

A. Benefits of Mainstreaming

As discussed in Point I, supra, mainstreaming is the principle that, to the maximum extent possible, handicapped children and nonhandicapped children should be educated together. The legal and moral underpinnings of mainstreaming may be traced to traditional notions of equality and fairness as expressed by this Court in a different but related context in Brown v. Bd. of Educ., 347 U.S. 483 (1954), and related cases. See generally, Haggerty & Sacks, "Education of the Handicapped: Towards a Definition of an Appropriate Education", 50 Temp. L. Q. 961, 962-63 (1977) (hereinafter Towards a Definition of an Appropriate Education). On a

different level, mainstreaming can be supported by the significant educational and social benefits it provides to handicapped children. These benefits include higher academic achievement and greater mastery of the social skills necessary for success in later life. In addition, mainstreaming can lead to a more positive attitude toward handicapped people on the part of nonhandicapped pupils, teachers and parents, and heightened expectations about their potential for learning and working.

When handicapped children are deprived of the opportunity to interact with their nonhandicapped peers, they have greater difficulty mastering effective communication skills, developing appropriate sexual behavior, and properly channeling their aggressive feelings. This is so because peer relationships are of primary importance in acquiring these and the other skills considered a part of normal childhood

development. See, e.g., Hartup, "Peer Interaction and the Process of Socialization", in Guralnick, ed., Early Intervention & the Integration of Handicapped and Nonhandicapped Children 27, 28 (1978) (hereinafter Early Intervention); Nordquist, "A Behavioral Approach to the Analyses of Peer Intervention", in Early Intervention at 53.

Children learn by imitating others and tend to imitate those who perform most effectively within their peer group. Bricker, "A Rationale for the Integration of Handicapped and Nonhandicapped Preschool Children", (hereinafter Bricker) in Early Intervention 3, 18-19. Thus, when separated from nonhandicapped children, handicapped pupils are deprived of effective role models, and their social and educational achievement is lower.

Peer expectations also perform an important role in determining educational and social achievement. Nonhandicapped peers tend

to encourage more "normal" behavior from handicapped pupils than other handicapped peers do in sheltered settings. Similarly, teachers of handicapped pupils in integrated settings tend to have higher expectations than teachers in sheltered settings and, thus, expect and receive more from their students. Id. at 18. Mainstreaming also tends to improve the handicapped pupil's self-image and reduces feelings of inferiority. The expectations of parents of such pupils are also increased as they see their children progress and become accepted by nonhandicapped pupils. Id. at 5-7.

Given more self-confidence, mastery of a greater array of social skills, and higher teacher and peer expectations, it is not surprising that handicapped pupils in mainstreamed settings do better academically than their counterparts in sheltered classrooms. See, e.g., Ziegler, "Integration of Young, Trainable, Mentally Retarded

Children into Regular Elementary School", 42 Exceptional Children 184 (1976); Guralnick, "The Value of Integrating Handicapped and Nonhandicapped Preschool Children," 46 Am. J. Orthopsych. 236, 237 (1976); Ruhl, "Mainstreaming", in Schmid & Nagata, eds., Contemporary Issues in Special Education 2, 11-19 (1983). Thus, mainstreamed children on the whole seem better equipped to live independently and to be economically self-sufficient as adults than their counterparts in sheltered settings. 14/

B. History of Mainstreaming

The notion of mainstreaming did not begin with the enactment of EAHCA in 1975 or

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14. Ruhl summarizes much of the research concerning the benefits of mainstreaming. Whether severely handicapped children, especially those with significant emotional disturbances or intellectual impairments, can or should be mainstreamed is the subject of professional debate. Id. at 2. However, situations like those of Amber Tatro -- where intelligence is unimpaired and the orthopedic problems can be reasonably accommodated -- are far different from the cases which are the subject of that debate.

with the court cases preceding it in the early 1970s. See, e.g., Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.C. Pa. 1971) and Mills v. Bd. of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972). Mainstreaming was a widely accepted principle of special education long before these developments. As early as 1903, some school districts had already established policies favoring placement of mentally retarded children in regular classrooms. Scheerenberger, A History of Mental Retardation 167 (1983). By the 1930s, acceptance of the concept had grown significantly. Said one commentator:

> The modern school aims to provide an environment conducive to the complete development of every child's potential . . . . Such a philosophy has significant implications for special education. The exceptional child is not apart from the school program, but merely a child who may need . . . an educational program adopted

to his individual needs.

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> "As nearly normal as possible", has been suggested as the slogan for education of the exceptional child.

Hefferman, "Meeting the Needs of Exceptional Children in Rural Schools", 2 J. Exceptional Children 49 (1935); see also, Berry, "The Exceptional Child in Regular Classes", 3 J. Exceptional Children 15 (1936) (asserting that the majority of handicapped children can be educated in regular classes).

During the 1940s and 1950s, support for mainstreaming grew rapidly. See, e.g., Challman, "Mental Health in Special Classes", 8 J. Exceptional Children 42, 44 (1941) (pointing to stigmatization, trauma, and other hazards associated with special classes); Tenny, "Adjustment of Special Class Pupils to Regular Classes", 10 J. Exceptional Children 139 (1944) (exceptional children can be prepared for citizenship in a normal community

through education in regular school); Robb, "Segregation versus Nonsegregation of Exceptional Children", 12 J. Exceptional Children 235 (1946) (benefits of social interaction); Tenny, "The Minority Status of the Handicapped", 20 Exceptional Children 260, 264 (1953) (segregation of the handicapped has prevented social contact with nonhandicapped children both in and out of school); Dewey, "Social Status of Physically Handicapped Children", 23 Exceptional Children 104, 132 (1956) (benefits of maximizing social interaction).

By 1962 mainstreaming had gained such widespread acceptance among educators that it could be reported:

> The prevailing view is that normal home and school life should be preserved if at all possible. When a special placement is necessary to provide suitable care or education, it should be no more "special" than necessary.

Reynolds, "A Framework for Considering Some

Issues in Special Education", 28 Exceptional Children 367, 368 (1962); see also, Deno, "Special Education as Developmental Capital", 37 Exceptional Children 229, 234-35 (1970). Studies undertaken during the 1960s and early 1970s demonstrated the superior performance of handicapped children in regular classrooms when compared to children in special classes. Voekler, "Organization, Administration, and Supervision of Special Education Programs", in Cruickshank & Johnson, eds., Education of Exceptional Children and Youth 659, 659-60 (3d ed. 1975).

Mainstreaming was not only viewed as a means to improve performance; many recognized that segregated programs were detrimental to the interests of handicapped pupils. In a landmark article on mainstreaming mentally retarded children, Dunn asserted that a "better education than special class placement is needed for [handicapped children] . . . ." He admonished educators not to "ignore the

evidence that removing a handicapped child from regular grades for special education probably contributes significantly to his feelings of inferiority and problems of acceptance." "Special Education for the Mildly Retarded -- Is Much of It Justifiable?", 35 Exceptional Children 5, 9 (1968).

The attitude of the education community toward mainstreaming at the time Congress was considering adopting the EAHCA is captured in this statement of the Council for Exceptional Children, perhaps the foremost national professional organization dedicated to promoting effective services for handicapped children:

> [E]ducation within the mainstream can provide the optimal opportunity for many exceptional children. Consequently, the system for the delivery of special education must enable the incorporation of special help and opportunities for them in mainstream settings whenever such approach is feasible. Children should spend only as much time outside regular classroom settings

> as is necessary to control learning variables that are critical to the achievement of specified learning goals.

The Council for Exceptional Children, "The Organization and Administration of Special Education -- A CEC Policy Statement", 40 Exceptional Children 70 (1973); see also, The Council for Exceptional Children, "Definition of Mainstreaming", 43 Exceptional Children 43 (1976); see also, Malloy, "The Changing Mandate for Special Education", 40 The Education Digest 6 (1975); Martin, "Some Thoughts on Mainstreaming", 41 Exceptional Children 150 (1974); and Wolfenberger, Normalization 46 (1972).

Federal policies during the late 1960s and early 1970s mirrored the attitudes toward mainstreaming that prevailed among educators. The United States Department of Health, Education and Welfare reported that it can no longer be "automatically assumed that it is best to insulate [handicapped children] from

the world of normalcy in which they must eventually learn to operate. There is a growing feeling that isolating them from normal chilren may in many cases be more damaging than efficacious." Ford, "Project Helping Hand: Innovative Special Education Service for a Rural Area," in United States Department of Health, Education and Welfare, Innovations in Special Education 33 (1972).

The National Advisory Committee on Handicapped Children expressed its support for the pro mainstreaming policies of the federal Bureau of Education, encouraging that agency to "continue . . . stimulating the integration of handicapped children into regular educational settings . . .." Third Annual Report 19 (1970); accord 1974 Annual Report of the National Advisory Committee on the Handicapped, First Class Citizenship for Handicapped People 5-6 (1974). The Committee's 1973 report supported policies "directed towards the reduction of dependency

on the part of the handicapped child . . . and entry into regular education programs . . .." National Advisory Committee on Handicapped Children, Basic Education Rights for the Handicapped 6 (1973). The Committee went on to report "[t]here is every reason to believe that special education [in a majority of the states] is reexamining its reliance upon self-contained special classes . . . and moving toward increased reintegration in the regular classes." 15/ Id. at 9-10. In a similar view, the National Advisory Committee on the Handicapped admonished government agencies at all levels to strive to guarantee handicapped children the "[o]pportunity to

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15. The Department of Health, Education and Welfare reported to Congress in 1973 that every state education department had at least a plan to promote mainstreaming of handicapped students. Hearings on S. 896 and S. 6 before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 453 (1973) (Statement of Stephen Kurzman, Asst. Secretary for Legislation, U. S. Department of Health, Education and Welfare.

participate with nonhandicapped individuals in the least restrictive environment commensurate with the education needs." Full Educational Opportunity Under the Law (1975).

From the foregoing it is clear that mainstreaming was already a widely accepted principle of special Education at the time Congress enacted EAHCA in late 1975.

C. Historical Obstacles to Mainstreaming

Despite professional acceptance of mainstreaming in education, starting as early as the turn of the century, implementation lagged far behind theory for several reasons: (1) funding for special education was often inadequate and disproportionately low in comparison to funding for regular education; (2) education practices using separate classroom facilities established in earlier periods of public hostility toward handicapped people carried an inertia of their own; and (3) school administrators were frequently

unwilling to make the accommodations necessary to allow handicapped children to be educated in regular classroom settings.

These difficulties were in part a reflection of historical prejudice. At the turn of the 20th century, public attitudes toward handicapped people reflected a mixture of fear and ignorance. Pseudoscientific beliefs abounded which viewed many handicapped people as parasites unworthy to survive, and worse, as menaces to the healthy population because of their supposed abnormally strong and ungovernable sexual drives and uncontrollable predisposition toward crime. President's Committee on Mental Retardation, Mental Retardation Past and Present 9 (1977) (hereinafter President's Committee). Consequently, most handicapped children received little, if any, education.

As the century progressed, public attitudes improved and special education programs increased, but the majority of

classes were segregated, often in separate facilities. Enormous numbers of handicapped children were still denied an education altogether. Reynolds & Rosen, "Special Education: Past, Present & Future" reprinted in Special Learning Corp., Exceptional Children: A Reference Book 3 (1978) (hereinafter Past, Present and Future); see generally, Ruhl, supra at 4-5. Although overt public hostility toward the handicapped had lessened by this time, many citizens viewed spending money to educate handicapped children as wasteful. 16/ Past, Present and Future at 5.

The confluence of several factors in the late 1940s led to a major turning point. With the return of large numbers of disabled

16. Education was viewed as preparing children to become contributing members of society. Children were expected to stay in school only long enough to acquire the skills needed to become productive. Therefore, many people questioned educating handicapped children whom they believed would never become contributors to society. Id.

veterans from World War II and, later, from the Korean conflict, the public became more sensitive to the plight of handicapped people generally. Sympathetic public attitudes were reinforced by medical research which revealed that the causes of many birth defects were not genetic but resulted from intrauterine and birth accidents. (For example, rubella during the first trimester of pregnancy and the overexposure of premature infants to oxygen were found to be major cause of blindness, mental retardation, and multiple handicapping conditions.) Id. at 6. And finally, parents, dissatisfied with the services available for their handicapped children, organized, forming numerous state and national organizations dedicated to changing governmental policies. President's Committee, supra, at 37-61.

Not surprisingly, special education enrollment increased dramatically after World War II -- with a 700% increase enrollment

recorded nationally between 1945 and 1970. Ruhl, supra at 5. However, programs for handicapped children continued to be separated and were still often inferior to education programs for nonhandicapped children. Handicapped students frequently confronted long waiting lists for the available services. Towards a Definition of an Appropriate Education, supra at 962.

Mainstreaming efforts were often frustrated by school officials who refused to accept handicapped pupils because facilities were not accessible or because the children were not toilet trained. Abelson, "Measuring Preschool's Readiness to Mainstream Handicapped Children", 55 Child Welfare 216, 218 (1976). Many of the ancillary services necessary to support children in a mainstreamed environment, such as physical therapy, speech therapy, and transportation were not available. Keogh, "What Research Tells Us About Mainstreaming", in O'Donnell

and Bradfield, eds., Mainstreaming: Controversy and Consensus 33-34 (1976); Cantrell & Cantrell, "Preventive Mainstreaming: Impact of a Support Services Program on Pupils", 42 Exceptional Children 137 (1976). Funding formulas based on self-contained units posed major obstacles to the establishment of the more flexible options necessary to mainstream handicapped children. Weintraub and Abelson, "Appropriate Education for All Handicapped Children: A Growing Issue", 23 Syracuse L. Rev. 1037, 1042 (1972).

Congress, in enacting the EAHCA, found that more than one-half of the handicapped children in this country were not receiving an appropriate education and that one million handicapped children were excluded from the public school system entirely. 20 U.S.C. §1400 (b)(4) and (6); Rowley v. Bd. of Education, 458 U.S. 176 (1982). To correct these major shortcomings in public education and to facilitate mainstreaming, Congress

mandated, as discussed in Point I, supra, that to the maximum extent feasible all handicapped children receive an education with nonhandicapped children and that they be excluded from regular classrooms only when education in such classrooms cannot be achieved satisfactorily even with the use of supplemental aids and services. 20 U.S.C. §1412 (5).

The impact of EAHCA was positive and immediate. A report by the National Education Association summarized the progress:

> There were many criticisms of the quality of educational programs for handicapped children, but even the harshest criticism was tempered by the acknowledgement of striking improvements in those programs since the enactment of P.L. 94-142. Significant changes were beginning to occur in the attitude of students, with handicapped children seeming to become more self-reliant as they moved out of sheltered environments, and nonhandicapped children becoming more accepting of handicapped children and understanding the ways in which their handicapped

classmates are different.

National Education Association, A Study Report: Education for All Handicapped Children: Consensus, Conflict, and Challenge, (1978); see generally, U.S. Dept. of Health, Education and Welfare, Progress Toward a Free Appropriate Education, A Report to Congress on the Implementation of 94-142, The Education for All Handicapped Children Act (1979).

D. Economic Benefits of Mainstreaming

From strictly an economic point of view, mainstreaming makes sense. The more restrictive and segregated programs are, the more they cost. Linder, Early Childhood Special Education 9 (1983). Mainstreaming makes use of available classrooms and facilities and reduces the need for separate, duplicate education programs. Bricker, supra at 9.

A Rand Corporation study commissioned by the United States Department of Education,

using 1977-78 cost data, demonstrated the economic advantages of mainstreaming. Rand surveyed 14 states, including Texas, and found that on an average, education in a regular classroom setting cost $901 per pupil. An education in a partially mainstreamed class ranged on average between $4345 and $4709; education in a separate classroom setting averaged $5352 per pupil. Kakalik, et al., The Cost of Special Education 37 (1981); Rand also found that the average cost of the related services for handicapped children was only $130 per pupil more than the cost of related services for nonhandicapped children. 17/ Id. at 19-20.

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17. The costs were $191 and $61 for handicapped and nonhandicapped pupils respectively. Related services for nonhandicapped students included nursing services, career counseling, and other similar services. Id. See also, National School Boards Association, A Survey of Special Education Costs in Local School Districts 26-27 (1979) (out of district nonresidential placements double the cost of educating handicapped pupils; residential placements quadruple the costs).

While Rand was careful to point out that these costs were averages and that individual variations occur with the type of condition, its severity, the age of the child, and the density of the handicapped child in a given district, id. at 38, it appears that in general an investment in related services is cost effective when it enables the child to attend a regular classroom, thereby eliminating the need for a substantially more costly separate program.

Amber Tatro's case illustrates this point. If Amber's parents could not afford to send a babysitter to school to perform CIC, as they do now, and could not travel to school themselves, Amber would have to be educated at home or in a special program where CIC was routinely available with the district billing the parents for CIC. If she remained at home, the district would be required to pay a tutor and physical therapist to provide her with education and related services. 20 U.S.C.

education and related services. 20 U.S.C. §1412. If Amber were placed in a special facility, the district would be required to pay this tuition (less the cost of CIC). Id. Either of these arrangements presumably would be significantly more costly to the district than paying for CIC to permit regular classroom instruction.

E. Other Considerations

It is important to emphasize that mainstreaming does not require that handicapped and nonhandicapped children be placed together indiscriminately, regardless of their individual needs. Regular classroom placement is appropriate only when the educational needs of the child can be satisfactorily met in such a setting with, if necessary, the use of supplementary aids and services. Guralnick, "Integrated Preschools as Educational and Therapeutic Environments", 115, 117 in Early Intervention; Past, Present and Future, supra at 7; 20 U.S.C. §1412 (2).

As discussed in Point I, supra, the IEP prepared for Amber Tatro by petitioner school district recognizes that placement in a regular classroom is both educationally appropriate and feasible. CIC is ancillary to Amber's educational needs, but necessary for her to attend class with her nonhandicapped peers. If this Court holds the school district is not required to provide CIC under these circumstances, then the future of mainstreaming will have been undermined, not only for Amber but for other handicapped children who need minor ancillary services in order to be educated in a regular classroom along with their nonhandicapped peers.

CONCLUSION

For the reasons stated, amicus respectfully submits that the decision of the Fifth Circuit, concluding that the school district was required to provide CIC to Amber Tatro, be affirmed.

Respectfully submitted,

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Counsel would like to express appreciation to Caren Winer, MSW, for her research assistance.

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MOTION FILED
MAR 26 1984

No. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,

Petitioner,

vs.

HENRI and MARY TATRO, Individually and as Next Friend of AMBER TATRO, A Minor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NEW YORK STATE COMMISSION ON THE QUALITY OF CARE FOR THE MENTALLY DISABLED, PROTECTION AND ADVOCACY SYSTEM, AS *AMICUS CURIAE*

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No. 83 - 558

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1983

Irving Independent School District,

Petitioners,

-v-

Henri and Mary Tatro, Individually and Next Friend of Amber Tatro, A Minor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Motion for Permission to File Brief Amicus Curiae

The New York State Commission

on the Quality of Care for the Mentally

Disabled, Protection and Advocacy System, respectfully moves this Court for permission to file the accompanying brief Amicus Curiae in support of respondents. Consent to file this brief has been sought from the parties; while respondents have consented, counsel for petitioner has not. Leave of this Court therefore is requested under Rule 36.

The interest of the amicus is set forth below. The accompanying brief addresses issues of fact and law concerning the simplicity of the procedure at issue, its treatment as a "related service" in other states, and the federal and state funding mechanisms for providing the procedure. These issues have not been discussed by petitioner, and amicus has reason to believe that its brief will supplement rather than reiterate the arguments made by respondents.

INTEREST OF THE AMICUS

The Commission on the Quality of Care for the Mentally Disabled (the "Commission") is an independent state agency within the Executive Department of the State of New York. It is designated by the Governor as the agency responsible for the establishment of a state-wide system of protection and advocacy for developmentally disabled persons, as mandated by the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. § 6001 et seq. The Commission devotes significant resources to the problems that developmentally disabled children confront in securing the "free appropriate public education" required under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (the "EAHCA"). From its direct experience with the difficulties developmen-

tally disabled persons face in all aspects of their lives, the Commission has come to realize that education is often the key factor in shaping their potential ability to become productive and contributing members of society. Thus, the question of what is a "related service" under the EAHCA is of crucial significance to the Commission's protection and advocacy function, and to the children it serves.

SUMMARY OF ARGUMENT

Clean intermittent catheterization (CIC) is a simple procedure which places little in the way of financial burdens on local school districts but is essential to the ability of a child with spina bifida to attend school. CIC is so simple that many children regularly perform it. School districts around the country are providing CIC to handicapped children with no evidence of any financial burden. Substantial funds are available to local school districts from both states and the federal government to assist school districts in meeting their obligations under the EAHCA. Indeed, there is nothing which prevents state governments from assuming the costs not

covered by federal grants to fulfill the mandate of the EAHCA.

ARGUMENT

CIC Is A Simple, Inexpensive Procedure Regularly Provided To Handicapped Children, Without Which They Cannot Attend School, And For Which Local School Boards Receive Substantial Federal And State Funds

This case presents the limited situation of a procedure which must be performed periodically during the day at frequent enough intervals that a child could not attend school without the procedure being performed. This case does not involve health services that could be performed outside of the school day because they are not required at intervals of less than four to six hours. Thus the spectre,

advanced by petitioner and amicus National School Boards Association that under the decision below, school boards would be liable for expensive health services such as kidney dialysis is inaccurate and misleading. Kidney dialysis can be performed outside of school hours and is generally not required more than three times weekly. In addition, the EAHCA expressly excludes the most expensive form of health services, those performed by a physician (except for diagnosis and evaluation), from the scope of related services which must be provided a handicapped child. 20 U.S.C. § 1401(17).

A. CIC is a Simple, Inexpensive Method of Providing Management of the Neurogenic Bladder Condition Without Which Spina Bifida Children Could Not Attend Public School.

Catheterization is required by the vast majority of children with spina bifida. In the case of Amber Tatro, her physician prescribed catheterization by the generally accepted method, CIC, at intervals of three hours, one of which occurred during the school day. Tatro v. Texas, 703 F.2d 823, 828 n.5 (5th Cir. 1983) ("Tatro II"), "Management of the neurogenic bowel and bladder is one of the most critical needs if the child with spina bifida is to have good health, social acceptability, and self-esteem. Poor management can result in repeated urinary tract

infections, kidney damage, and even death. In addition, poor management results in constant wetness, skin problems, and odor, making the child socially unacceptable and self-deprecating." M. Woldranch, The Needs of Children with Spina Bifida 14-15 (1983). The bladder problems of children with spina bifida are the result of "the defect in the spinal cord [which] prevents the impulses from reaching the brain" which would otherwise control the bladder functions. C. Swinyard, The Child With Spina Bifida 20 (Spina Bifida Assoc. of America 1980). In addition, the functional relationship between the bladder wall muscle and the sphincter may be impaired. The sphincter is a muscle which acts as a valve that opens to allow urine to flow from the bladder

into the urethra and then closes and stops the flow. Id. As a result, a spina bifida child may suffer both regular leakage and an inability to fully empty the bladder. The most serious danger to a spina bifida child from the bladder is the "passage of urine from the bladder back into the ureters (called urinary reflux) with resultant enlargement of the ureters and destruction of the kidneys from urinary pressure and infection . . . The key to preventing this complication is frequent and complete evacuation of urine from the bladder . . . [A]ll children should try to empty the bladder on a timed schedule which is suitable for them." Id. at 21-22. The District Court found that there is a risk of serious injury if Amber Tatro

does not receive catheterization during school hours. Tatro v. Texas, 516 F. Supp. 968, 977 (N.D. Tex. 1981).

The simplicity with which CIC can be administered is clear from the procedures prescibed for Amber and other children by the Texas Scottish Rite Hospital for Crippled Children set out by the Court of Appeals. Tatro II, 703 F.2d at 828-29, n.5. CIC involves nothing more than the insertion of a rubber or plastic tube one inch into the urethra. The urine in the bladder then drains out and the tube is removed. The process is no more complex or dangerous than taking a child's temperature through the rectum, indeed less so because a thermometer is usually made of glass.

The procedure is so simple that a child can perform it and usually does so for herself. A study demonstrated that a child with the mental age of a five year old can be trained to self-catheterize using CIC. Hannigan, Teaching Intermittent Self-Catheterization to Young Children with Myelodysplasia, 21 Developmental Medicine and Child Neurology 365 (1979). The United States Department of Health Education and Welfare funded the preparation of a booklet entitled "Intermittent Self Catheterization for Girls Ages 4 to 7 Years," and another booklet for boys, both by Hannigan and Hart, designed to be read to children who may not even be able to read but may be able to catheterize themselves. The ability of most children to self-catheterize means that even the minimal costs of pro-

viding CIC to young children will come to an end as the child learns to provide for herself.

B. CIC Is Regularly Provided To Handicapped Children By School Boards Around The Country

One measure of whether providing CIC to handicapped children is financially burdensome on school districts is the extent to which the districts are currently providing CIC services to children. The state regulations for programs under the EAHCA generally do not spell out in detail all the individual health services included as "related services." Accordingly, amicus undertook a mail and telephone survey of twenty states chosen to assure a cross section geographically

and by population density. Fourteen states responded; these states and the names and titles of officials providing the information are set forth in the footnote below.[1]

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[1] State Boards of Education surveyed:
Arizona - Shirley Bowman, Education Program Specialist for the Federal Projects
California - Bob Evans, Consultant Special Education and Asst. to the Dir. of Special Education
Florida - Dr. Wendy Cullar, Dir. of Exceptional Students
Kentucky - Lynette Uhl, Dir. of Unit of Procedural Safeguards
Illinois - Betty Endicott, Special Education Specialist
Minnesota - Marilyn Sorenson, Education Specialist
Mississippi - Carolyn McGuire, Asst. Program Supervisor, Special Ed. Section
Montana - Gail Gray, Director of Special Education
New Hampshire - Robert Kennedy, Dir. of Special Ed. Section
New Jersey - Mari Malenaar, Planning Associate, Division of Special Education
North Carolina - Beverly Gardner, Secretary of Related Services
North Dakota - Shelby Niebrgall, Asst. Dir. of Special Ed.
Oklahoma - Glenn J. Haring, Asst. Officer for Procedural Safeguards,
(Contined on p. 11)

Not a single state that responded reported knowing of a school district that refused to provide CIC services needed by a handicapped child.[2] Eleven of the fourteen respondents reported that school districts in their states were providing CIC services.[3] Once a doctor prescribes catheterization, the daily school regime is usually worked

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Special Ed. Section
Wisconsin - Dr. Betty Ross-Thomson, Supervisor of Physical and Other Health Impaired

2 A school district in Pennsylvania refused to provide CIC services, leading to the litigation in Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981), cert. denied sub nom. Scanlon v. Tokarcik, 458 U.S. 1121 (1982), in which the court held that CIC was a related service.

3 California, Florida, New Hampshire, Kentucky, Illinois, Minnesota, Mississippi, New Jersey, North Carolina, Oklahoma, Wisconsin. In addition the record herein reveals that the Dallas school district adjacent to petitioner provides CIC services. Pl. Ex. 5 B (I.H. Tr. 19).

out between the parents and the school district. The procedure is performed by a school nurse or other school personnel trained for the purpose. Providing CIC service usually does not entail additional personnel costs for a school district.

Amicus also requested information of states concerning dispensation of medication by school personnel to children because of the parallels to providing CIC services. Dispensation of medicine, like CIC, requires a prescription by a physician, involves a dosage that must be taken at frequent intervals including school hours, and can be performed by someone other than a physician with relatively little training. Twelve of the fourteen reporting states (all but Arizona and

Wisconsin) reported that school districts in their states were dispensing medication prescribed by physicians, either by a nurse, school aide or teacher. Again no state reported a single school district refusing to administer prescibed medication. The petitioner school district herein administers medication. Pl. Ex. 2 (Tr. 38).

There is little in the way of reported decisions as to whether CIC is a "related service," which may indicate that most school districts are providing the service on request. In addition to the court below, one other

decision also held that CIC must be provided to handicapped children,[4] and there are none to the contrary.

In Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981), cert. denied sub nom. Scanlon v. Tokarcik, 458 U.S. 1121(1982), the Third Circuit held that CIC fell within the meaning of a "related service" under the EAHCA. Id. at 455-459. The Court considered the alternatives to CIC (placement in a special class for handicapped children or at-home tutoring), but decided that CIC was the most economical and the best method of providing an integrated, meaningful educational program

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[4] See also Hairston v. Drosick, 423 F.Supp. 180 (S.D. W.Va. 1976), reaching the same result under the Rehabilitation Act of 1973, 29 U.S.C. §794.

for the handicapped child in the least restrictive environment. Id. at 458 n.26.

The Court of Appeals noted that when considering CIC, the "difficult value choices between placing the burden of fiscal limitations on handicapped children as opposed to school districts, or between advantaging a handicapped child by mainstreaming rather than enhancing the education of her nonhandicapped students by excluding her, do not even confront us." Id. at 458. The Court explained:

> The CIC service has no serious potential for disrupting the education of Amber's nonhandicapped peers. In fact the district court found that, "Amber Tokarcik places absolutely no burden on her teacher." App. 50.

> Nor does it pose an undue drain on the school system's financial situation. There are simply no legitimate educational or fiscal grounds for denying Amber a right to participate in the regular classroom setting. Id.

A closely analogous case found a service very similar to CIC to be a "related service." In Department of Education, State of Hawaii v. Katherine D., 531 F.Supp. 517 (D. Hawaii 1982), a four year old girl suffering from cystic fibrosis was required to use a tracheotomy tube to assist her breathing. In order for Katherine to attend public school, a trained person had to be available to attend to her various health needs including suctioning excess mucus from her lungs, administering medication before lunch, and reinserting her tracheotomy tube should

it become dislodged. Id. at 521. The Court held that a home-bound program did not satisfy the meaning of "least restrictive environment" as prescribed by the federal regulations. Id. at 525. Evidence showed that the services Katherine required could be performed by a school nurse or other trained person who need not be a physician. Id. at 526. Thus, the services Katherine required were "school health services" covered by the "related services" provision of the EAHCA. Id.

In addition to state practice and case law, administrative interpretation of the "related services" requirement supports a finding that CIC is such a service. See Tokarcik v. Forest Hills School District, supra, 665 F.2d at 456-57. In early 1981, the Department

of Education issued a notice of interpretation stating that CIC is a related service. 46 Fed. Reg. 4912 (Jan. 19, 1981). Subsequently, the new administration suspended the interpretation, see 46 Fed. Reg. 12495 (Feb. 17, 1981), but its latest action on the issue is a de facto recognition of CIC as a related service. On May 8, 1981, the agency again "postponed" the earlier interpretation pending a comprehensive review, 46 Fed. Reg. 25614, but allowed CIC as a reimbursable cost under EAHCA, stating:

> The Secretary is concerned that handicapped school children be educated to the greatest extent possible in the least restrictive environment. The Secretary is also concerned that the differentiation between related services and medical services be clarified. The Secretary declines to issue an interpretation based on

> regulations that are ambiguous and subject to review. In the interim, the provision of clean intermittent catheterization as a related service will be treated as an allowable cost under Part B of the EHA. Id. (emphasis added).[5]

By allowing the states to claim catheterization as a "related service" for EAHCA funds, the Department of Education continues to recognize catheterization as a "related service." In the almost three years that have passed since May 1981, the authorization of CIC as a related service has not been altered.

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[5] Petitioner fails to include in its quotation of this announcement the crucial last sentence (Brief of Petitioner at 23), thus omitting the fact that CIC as a "related service" is an allowable cost under of the EAHCA.

The few cases on point and the only federal interpretation that addresses CIC indicate that the concept of "mainstreaming" or providing education in the least restrictive environment, which is a fundamental goal of EAHCA (see 20 U.S.C. §1412(5)), is also the most cost effective method for providing education to handicapped children. As the Court noted in Tokarcik,

> [I]f the school district did not have a nurse of aide available to catheterize Amber, it would still be obligated to provide her with an appropriate education. And the two possible alternatives -- at home instruction or a special class for the handicapped -- would appear to be less cost beneficial. 665 F.2d at 458 n.26.

The willingness of petitioner school district to support education for Amber Tatro in her home or in a private school negates any claim to financial concerns about providing CIC in the public school. If anything, the record seems to indicate that the refusal to provide Amber Tatro with CIC stemmed from the fact that the school district's supervising school nurse was unfamiliar with the CIC procedure. Pl. Ex. 5 B (I.H. Tr. 140-147). Whatever the reason, it is contrary to the requirements of the EAHCA.

C. Substantial State and Federal Funds Are Available To Assist School Boards in Meeting Their Obligations To Handicapped Children Under EAHCA.

The cost of providing CIC services is nominal; but even if it were more expensive, school boards would be obligated to provide them. School boards need not assume the financial burdens imposed by the EAHCA; the question of whether the state or the local school board should pay the costs is purely one of state law. While the EAHCA imposes a matching fund requirement on states, local school boards face no similar obligation. 20 U.S.C. §1411(c)(2)(B). Moreover, no state is required to accept funding under EAHCA. If a state believes the requirements of EAHCA are too costly it

may decline the federal funds and be free of all federal requirements under EAHCA.

Congress was not unaware that a commitment to educate every handicapped child is a costly one. S. Rep. No. 168, 94th Cong., 1st Sess. 14, 15 (1975); H. Rep. 332, 94th Cong., 1st Sess. 12 (1975).Years before the passage of the EAHCA, however, Congress recognized that many more than half of all handicapped children throughout the nation were largely without meaningful educational programs. Between 1966 and 1974, several federal grant programs were enacted in the hope of encouraging states to expand and improve such programs. S. Rep. 168, 94th Cong., 1st Sess. 5 (1975). These block grants proved inadequate: the

limited funds available required states to make arbitrary decisions as to which children would benefit, thus leaving most of the handicapped without additional assistance. Id. at 15.

The passage of the EAHCA in 1975 represented a greatly increased commitment of funds by the federal government, with a concomitant imposition of legal duties upon the states and localities that choose to participate. The receipt of federal funds was made contingent on the provision to every handicapped child of a "free appropriate public education" and "related services" in the regular classroom to the maximum extent appropriate. 20 U.S.C. §1412.

Congress envisioned a federal-state-local partnership to finance this expansion of opportunity for handicapped children. No one governmental entity solely was to bear the financial responsibility. While state and local budgetary concerns were voiced repeatedly, Congress "reject[ed] the argument that the Federal Government should only mandate the services to the handicapped children if, in fact, [federal] funds are appropriated in sufficient amounts to cover the cost of this education." S. Rep. No. 168, 94th Cong., 1st Sess. 22 (1975).

As Senator Stafford stated, "Make no mistake, educating our children is still very much a state responsibility, and this bill does not change that. It intends that the states and local

districts provide the same support for handicapped children as they do for all other children. The Federal dollars are to supplement the state and local commitment." 121 Cong. Rec. 20428 (Nov. 19, 1975). Just as there is "a significant increase in the Federal contribution to the education of handicapped children, the States will also be required to provide a commensurate increase in their commitment to the education of handicapped children." 121 Cong. Rec. H11353 (Nov. 18, 1975) (statement of Rep. Mink).

Accordingly, the EAHCA provides a basic formula for allocating federal monies to states and local districts. To calculate the federal grant, the number of handicapped children receiving "special education and related

services" (up to a cap of twelve percent of that state's entire student population)[6] is multiplied by forty percent of the national average per pupil expenditure. 20 U.S.C. § 1411(a). In other words, the federal government contributes for every handicapped child, forty percent of average per pupil education costs.

Local districts receive a direct pass through of 75% of the federal grant to a state; 25% of the state allocation must be used for direct and

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[6] The twelve percent cap was based on Congress' estimate of the maximum number of handicapped children in the country. The purpose of the cap was to prevent against overcounting or mislabelling of children as handicapped. In 1981, for example, 10.47 percent of school aged children, 3-21, were classified as handicapped for purposes of the Act. U.S. Department of Education, Fifth Annual Report to Congress on the Implementation of Public Law 94-142 at 4 (1983).

supportive services for handicapped children, with a small allowance for administrative costs. 20 U.S.C. § 1411(c)(1). Moreover, the state allocation must be matched by the state with other than federal funds; no matching obligation whatsoever is imposed upon school boards. 20 U.S.C. § 1411(c)(2)(B).

Finally, the EAHCA requires that the federal funds must be used to supplement and increase special education programs, and "in no case to supplant" state and local funds used for special education, 20 U.S.C. § 1413 (a)(9), and that the funds be passed through to localities in proportion to the number of handicapped children in the district. 20 U.S.C. § 1411(d).

Under this scheme, the amount of federal monies injected into the nation's school districts is not insubstantial. The figure has grown dramatically from 200 million dollars in fiscal year 1977 to 931 million dollars in fiscal year 1983. U.S. Department of Education, Fifth Annual Report to Congress on the Implementation of Public Law 94-142 at 16 (1983). Texas receives the second largest allotment of federal funds: over 61 million dollars in 1983. Id. at 169.

As Congress envisioned, however, these federal funds are supplemental to monies contributed by the State of Texas and its local governments: the contemplated three part partnership is fully realized. The state government provides to localities a large propor-

tion of general education costs, and for special education, vastly more than the required match of the 25% of the federal allocation. Local districts significantly benefit from the 75% federal pass through, as well as from the state contribution.

State aid in Texas is distributed through the Foundation School Program, which supplements local property taxes in order to guarantee, regardless of tax base, "that each school district ... has adequate resources to provide ... a basic instructional program suitable to [each student's] education needs." Tex. Educ. Code Ann. § 16.001 (Vernon Supp. 1982-83).

The amount of money given to local school districts by the State of Texas is massive. In 1982-83, a total of 8.456 billion dollars was spent in the state for elementary and secondary education.[7] Of this total, 3.6 billion dollars came from state revenues. Approximately 380 million dollars of the state funds were earmarked specifically for special education.[8] In addition, localities received the 75% allocation of some 61 million dollars in federal aid.

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7 Telephone interview with Thomas C. Patton, Director, Division of State Funding, Texas Education Agency, March 20, 1984.

8 Letter from Raymon L. Bynum, Commissioner of Education to Texas Governor Mark W. White (July 26, 1983) (enclosing Foundation School Fund budget, 1982-83).

A detailed statutory formula governs the distribution of state monies for special education and related services. Tex. Educ. Code Ann. § 16.104 (Vernon Supp. 1982-83). Each school district is entitled to thirty "special education personnel units" for its first 3,000 students, one unit for each additional 100 students up to 6,000, and .85 units per 100 students thereafter. A personnel unit is equal to one special education teacher or approximately two educational aides, for example. Tex. Educ. Code Ann. § 16.056. A district receives 100% of its allocation if it has a 12% handicapped student body (the equivalent of the federal cap); the allocations decrease as the percentage of handicapped students in a district declines. Tex. Educ. Code Ann. § 16.104. Thus,

the Texas formula takes into account the needs of the smaller school districts as well as the larger, and variances among districts in the percentages of handicapped children.

Assuming a school district of 3,000 students, 12% or 360 of whom are handicapped, 30 additional teachers or one teacher for every twelve handicapped children may be provided, for example. The locality may divide its units as it requires, hiring teachers, aids or specialists within its allocated units. The salaries of such staff are paid out of state revenues from the Foundation School Program Fund, not from local taxes. Tex. Educ. Code Ann. § 16.104(o). The State contributes an additional $400 per unit which may be used for a variety of

support services, such as instructional materials, and related services. Tex. Educ. Code Ann. § 16.104(d)(6).

Thus, the State of Texas has demonstrated its willingness and capacity to provide funds to support public education in the state and special education as well. Texas' anticipated special education expenditure of 411 million dollars for 1983-84 is 27 times its 25% matching requirement of funds it received under the EAHCA. The State, with its broad tax base, can and does provide funds for the education of handicapped children. Texas has acted in accordance with the intent of Congress in financing special education programs so that children like Amber Tatro can attend the regular public schools and progress educationally, socially and emotionally along with other children her age.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE

THE SPINA BIFIDA ASSOCIATION OF AMERICA, THE EPILEPSY FOUNDATION OF AMERICA, THE NATIONAL EASTER SEAL SOCIETY, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE AMERICAN COUNCIL OF THE BLIND, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND, THE ASSOCIATION OF CHILDREN AND ADULTS WITH LEARNING DISABILITIES, THE NATIONAL ASSOCIATION OF THE DEAF, THE INTERNATIONAL ASSOCIATION OF PARENTS OF THE DEAF, UNITED CEREBRAL PALSY ASSOCIATION, INC., THE DOWN'S SYNDROME CONGRESS, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE NATIONAL SPINAL CORD INJURY ASSOCIATION, THE NATIONAL TUBEROUS SCLEROSIS ASSOCIATION, INC., THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, THE PENNSYLVANIA ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, UNITED CEREBRAL PALSY OF NEW YORK CITY, THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE CENTER ON HUMAN POLICY, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF AFFIRMANCE

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S. Rep. No. 94-455, 94th Cong. 1st Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480 20

Other Authorities:

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] *amici* Spina Bifida Association of America and 20 other non-profit organziations file this brief in support of respondents Henri, Mary and Amber Tatro.

Amici include among their members children with, *inter alia*, cerebral palsy, epilepsy, spina bifida, learning disabilities, visual and hearing impairments, the families of these children and others concerned with their welfare. Physically and mentally disabled youngsters have historically been excluded from their fair share of public education services and from the societal benefits those services make possible. Children such as these have often lived in forced physical and social isolation — hidden rather than helped by this society.

Recognizing the human and economic costs of this discrimination, Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The EAHCA compels recipient states to open their public schools to the handicapped and to provide them with meaningful education programs; Section 504 prohibits school districts and other recipients of federal financial assistance from engaging in discriminatory or stigmatizing practices with respect to the disabled.

This case presents precisely the type of exclusion and precisely the type of stigmatizing treatment which these laws prohibit, and thus its importance to respondent Amber Tatro and to *amici* is obvious. It is because of this acute concern that *amici* seek this opportunity to be heard and to urge the affirmance of the decision of the Court below.

Amici herein are:

(1) *Spina Bifida Association of America* (SBAA), organized in 1972, seeks to increase public

1. Letters of Consent to the filing of this brief have been lodged with the Clerk of the Court.

awareness and understanding of spina bifida. SBAA's membership consists of adults and youngsters with this birth defect, their parents and other members of the community involved with the care of or provision of services to individuals with spina bifida. The Association conducts national conferences with seminars on scientific, social, medical and education matters, and provides support to individuals and families through a network of chapters;

(2) *The Epilepsy Foundation of America* (EFA) is the only national, charitable, non-profit voluntary agency in the United States specifically dedicated to the welfare of children and adults with epilepsy. EFA is committed to the prevention and control of epilepsy and to improving the lives of the approximately two million Americans with the condition;

(3) *The National Easter Seal Society* is the country's oldest and largest non-profit health care agency providing direct services to children and adults with disabilities due to any cause. Throughout its 60 year history, the Easter Seal Society has provided services focusing not only on individuals with disabilities, but also addressing the removal of barriers that prohibit the disabled from entering the mainstream of their communities;

(4) *The American Coalition of Citizens with Disabilities* (ACCD) is an association composed of national, state and local organizations of and for disabled persons. ACCD represents some eight million disabled individuals, parents of disabled persons and service providers, and is the only national coalition of disability groups of all types;

(5) *The American Council of the Blind* (ACB) is the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to insure that blind people, incuding blind school-aged youngsters, have the opportunity to participate fully in all aspects of American life;

(6) *The Affiliated Leadership League of and for the Blind of America* (ALLB) is a non-profit organization consisting of eighty national, state and local organizations of and for blind people, including almost all of the national organizations of and for blind people. The ALLB is dedicated to advancing the rights of and obtaining services for blind people;

(7) *The Association of Children and Adults with Learning Disabilities* (ACLD) is a voluntary association with over 60,000 members in 800 chapters throughout the country. Membership is composed of learning disabled individuals, parents of the learning disabled and professionals who work with learning disabled people. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities;

(8) *The National Association of the Deaf* (NAD) is a national non-profit organization of approximately 18,000 members who are hearing-impaired adults, parents of hearing-impaired children and professionals who serve deaf individuals. The NAD is the largest consumer organization of hearing impaired people in the United States;

(9) *The International Association of Parents of the Deaf* (IAPD) is an international organization composed primarily of parents of deaf individuals. The purpose of IAPD is to provide information and support to families with children who are deaf or hard of hearing;

(10) *United Cerebral Palsy Association, Inc.* (UCPA) is a national voluntary health organization formed in 1949. UCPA conducts public and professional educational and advocacy programs, supports research in cerebral palsy and, in conjunction with its 225 affiliates, provides direct services to persons with cerebral palsy, members of their families and those with similar service needs;

(11) *The Down's Syndrome Congress* is a national service organization of over 550 local parent groups, representing a constituency of a quarter-million families having at least one person in the family with Down's Syndrome. The primary purposes of the Congress are to increase public awareness of Down's Syndrome and to provide support to parents and families of Down's Syndrome individuals;

(12) *The National Mental Health Association* is a voluntary organization dedicated to the promotion of mental health, the prevention of mental illness and the improved care and treatment of persons with mental illness. The 650 Mental Health Association local chapters and state divisions and its more than one million citizen volunteers work toward these goals through a wide range of activities in social action, education, advocacy and public information;

(13) *The National Spinal Cord Injury Association* (NSCIA) is a non-profit voluntary health organization committed to a comprehensive approach to the problem of spinal cord injury. Activities include research toward a cure for the paralysis resulting from spinal cord injury and services to persons who have sustained an injury and to their families. The NSCIA is committed to the proper care and independence of its members;

(14) *The National Tuberous Sclerosis Association, Inc.* (NTSA) is a voluntary non-profit organization established to provide a better quality of life for those afflicted with tuberous sclerosis and to encourage research and education which will prevent future generations from experiencing the tragedies of this neurological disease. NTSA was founded in 1974 and currently has a membership of 1500 families;

(15) *The Developmental Disabilities Advocacy Network of Pennsylvania* (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled children and adults;

(16) *The Pennsylvania Association for Retarded Citizens* (PARC) is an organization of approximately 14,000 persons, most of whom are parents of retarded individuals. PARC has long been concerned with the educational services available to retarded children and brought the landmark case concerning the right of such children to attend public school, *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972);

(17) *The Pennsylvania Association for Children and Adults with Learning Disabilities* (PACLD), founded in 1967, is an organization of approximately 800 persons, most of whom are parents of learning disabled children. PACLD assists parents in understanding their children's rights to special education services and obtaining the services to which they are entitled;

(18) *United Cerebral Palsy of New York City, Inc.* (UCP-NYC) is a non-profit corporation formed to advance the interests of cerebral palsied individuals in New York. UCP-NYC provides direct services to children and adults and conducts public and professional education and advocacy programs;

(19) *American Association on Mental Deficiency* (AAMD) is a multidisciplinary, scientific organization consisting of nearly 10,000 professional members. With 17 divisions and 9 regional and 35 state chapters, the AAMD has provided long-stand-

ing national and international leadership in the field of mental retardation;

(20) *The Center on Human Policy* (CHP) is a research and policy institute of the Division of Special Education and Rehabilitation at Syracuse University. CHP was founded in 1971 for the study and promotion of open settings for people with disabilities;

(21) *The American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. Among those fundamental rights are the right to be free from discrimination based on handicap and the right to a public education.

STATEMENT OF THE CASE

Seven-year-old Amber Tatro was born with spina bifida, a condition which has left her with orthopedic and speech impairments and, most importantly for this case, a neurogenic bladder — that is, she has no sensation of bladder fullness and cannot void voluntarily. Spina bifida has no impact on Amber's intelligence, however, and she currently receives the bulk of her education in a classroom with non-handicapped children. *Tatro v. State of Texas*, 703 F.2d 823, 825 (5th Cir. 1983) (*Tatro* IV); *Tatro v. State of Texas*, 516 F. Supp. 968, 970-971, 974 (N.D. Tex. 1981) (*Tatro* III); Respondents' Brief.

The procedure which is used to deal with Amber's neurogenic bladder is called Clean Intermittent Catheterization (CIC). At regular intervals, a tube is used to release the urine collected in Amber's bladder; neither a special environment nor sterile equipment is needed. CIC takes only a few minutes, and a person with no technical knowledge can be taught to perform it in less than an hour. Amber has been safely catheterized by her parents, her babysitter, her teachers and teachers' aides and her teenage brother. Soon, Amber will be able to catheterize herself. *Tatro* III at 970-971 n. 1, 974.

CIC has dramatically changed and greatly simplified the lives of many children with spina bifida. With the use of this safe, simple and inexpensive aid to toileting, children who once would have died in early childhood or led restricted and segregated lives now have normal lifespans and work, play and attend school with their non-handicapped peers. *Tatro* III at 974; *Tokarcik v. Forest Hills School District*, No. 79-338, slip op. at 4-5 (W.D. Pa. Oct. 31, 1980), *aff'd*, 662 F.2d 443 (3d Cir. 1981), *cert. den.*, 102 S.Ct. 3508 (1982); see, *Hairston v. Drosick*, 423 F. Supp. 180, 182-183 (S.D. W.Va. 1976).

In 1979, when Amber was old enough to attend school, her parents approached Petitioner Irving Independent School District ("the District") for educational services. The District evaluated Amber, developed an Individualized Education Program (IEP) for her and recommended that she be placed in the District's Early Childhood Development Classes. However, the District refused to include in that IEP a commitment to provide CIC. *Tatro* III at 971.

With the exception of this omission of CIC services, the Tatros agreed that the IEP and the proposed placement were appropriate for Amber. But Amber, like all other students, could attend the recommended program only if she could empty her bladder during the school day. Thus, the Tatros requested that the District's refusal to provide CIC be reviewed at an impartial due process hearing convened in accordance with the requirements of federal and state law. The Hearing Officer found in favor of the Tatros and ordered the District to provide Amber with CIC services. This decision was affirmed by the State Commissioner of Education, but was subsequently reversed by the State Board of Education. *Id.* at 971.

The Tatros then filed this action in federal court, seeking, *inter alia*, a permanent injunction ordering the District to provide CIC for Amber while she attends school. *Id.* at 971. The proceeding resulted in a decision of the United States Court of Appeals for the Fifth Circuit in favor of the Tatros under The Education of the Handicapped Act, as amended by The Education For All Handicapped Children Act of 1975, 20 U.S.C. Sections 1401 *et seq.* (EAHCA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (Section 504). That decision is the subject of the instant proceeding.

SUMMARY OF ARGUMENT

The EAHCA requires Petitioner School District to provide Amber with Clean Intermittent Catheterization (CIC) services. Amber is a handicapped child and must receive from the school district special education and those related services needed to assist her to benefit from special education. CIC is such a related service. 20 U.S.C. Section 1401(17).

Moreover, the EAHCA guarantees Amber the right to be educated with her non-handicapped peers to the maximum extent appropriate to her needs. Thus, it requires Petitioner School District to provide her with those "supplementary services" necessary to achieve this goal. With CIC, Amber can attend a regular education program; without it, she must receive her schooling at home or in a restrictive setting. Thus, CIC is also a "supplementary service" which the District must provide to Amber. 20 U.S.C. Section 1412(5)(B).

Under Section 504, recipients of federal financial assistance such as Petitioner are prohibited from discriminating against or denying the benefits of their programs to qualified handicapped persons such as Amber. Non-discrimination includes making those reasonable accommodations necessary to meet the needs of the handicapped as adequately as the needs of the non-handicapped are met. CIC is such a reasonable accommodation, and the Petitioner's refusal to provide it violates Section 504.

ARGUMENT

I. Amber is entitled to CIC Services Under the Education of the Handicapped Act, as Amended

A. The Education of the Handicapped Act, as Amended, Was Intended to End the Exclusion of Handicapped Children from Public Education Programs and to Guarantee Them Special Education and Related Services in the Least Restrictive Environment

The EAHCA is a source of substantial federal financial assistance for states that agree to comply with its funding conditions. *Board of Education of Hendrick Hudson School District v. Rowley* 458 U.S. 176, 179 (1982). This enactment, which was the culmination of years of Congressional study and concern, represented an

> ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.' " H.R. Rep. No. 94-332, p. 2 (1975). *Rowley* at 179.

Congress' concerns were well-founded. Many states totally excluded disabled youngsters from their public schools. *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *PARC v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). Others denied schooling to children unable to meet certain behavioral objectives, such as toilet training.[2] Still others simply admitted the handi-

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2. Goldstein, Arkell, Ashcroft, Hurley and Lilly, "Schools," in II ISSUES IN THE CLASSIFICATION OF CHILDREN 4, 5 (N. Hobbs ed. 1975).

capped to regular education programs, leaving the children to "fend for themselves in classrooms designed for education of their nonhandicapped peers." *Rowley* at 191.

The EAHCA was designed to end all forms of exclusion. It defines its beneficiary class broadly, including within its coverage children with all types and degrees of intellectual and physical impairment. 20 U.S.C. Sections 1401(1); 1412(2)(C) and (3). *Rowley* at 181; *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981). Congress fully recognized that it was legislating for a highly diverse population with varied educational needs. Thus, instead of specifying the programs and services which are appropriate for all handicapped youngsters, the Act establishes a procedure by which programs and services are determined based on the individual needs of each child. *Rowley* at 202, 205.

Handicapped children are entitled to appropriate "special education" services. Special education is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child . . . . " 20 U.S.C. Section 1401(16). But physical and mental impairments can limit learning in ways that specialized instruction alone cannot overcome. It does little good, for example, to develop a special education program for a physically impaired youngster and then fail to provide the physical therapy the child needs to sit at a desk. Thus, the EAHCA also requires that each handicapped child receive "related services," those "developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . . . " 20 U.S.C. Section 1401(17). The statute lists physical and occupational therapy, recreation and a number of other examples of related services, but consistent with the need to be illustrative rather than exhaustive, Congress did not attempt to specify all possible

related services. See, Comment to regulatory definition of "Related Services," 34 C.F.R. Section 300.13 (1983).

The EAHCA also mandates that, to the maximum extent possible, handicapped youngsters attend school in regular education programs together with their non-handicapped peers. *Rowley* at 202. This right to be educated in the "mainstream" can be limited

> only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . 20 U.S.C. Section 1412(5)(B).

The EAHCA, then, was designed to end the exclusion of handicapped children from public education programs; to insure that they receive individualized programs of education and related services from which they can derive meaningful educational benefit; and to prevent the unnecessary segregation of handicapped children from their non-disabled peers. *Rowley* at 179, 200-203. With these mandates in mind, we turn to the question in this case — does the EAHCA require that Amber's School District provide her with the CIC services she needs to attend her recommended education program? *Amici* contend that the answer is yes.

B. Amber is Entitled to Receive CIC as a "Related Service"

All parties concede that Amber is "handicapped," 20 U.S.C. Section 1401(1), and is entitled to the special education and related services she needs. The Court of Appeals held that CIC is a related service and ordered the District to provide it to Amber during school hours until she reaches an age at which she can self-catheterize. *Tatro v. State of Texas*, 625 F.2d 557, 564 (5th Cir. 1980) (*Tatro* II); *Tatro* IV at 831. The Court's reasoning and its conclusions are correct and are consistent with those of every other court to consider this matter. *Tokarcik, supra*, 665 F.2d at 459; *Hairston v. Drosick*,

423 F. Supp 180 (S.D. W.Va. 1976); see also, *Department of Education, State of Hawaii v. Katherine D.*, No. 82-4096, slip op. (9th Cir. Nov. 7, 1983) (handicapped child entitled to maintenance of tracheostomy tube); *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981).[3]

The statutory definition of related services is relatively straightforward. *Tokarcik, supra* at 455. Related services are

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. . . . 20 U.S.C. Section 1401(17).

As the courts below noted (including the District Court in its initial opinion denying Amber services), CIC falls squarely within this definition: (1) CIC is a supportive service; (2) CIC is needed to assist Amber to benefit from her special education program; and (3) CIC is not a medical service. *Tatro* II at 562-563.[4]

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3. Petitioner's contention that judicial review under the EAHCA is limited to insuring compliance with the state plan and other procedural safeguards was expressly rejected in *Rowley, supra*. The Court there stated:

> [I]nquiry [under 20 U.S.C. Section 1415(e)(2)] will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of Section 1401(19) [including special education and related services]. *Id.* at 206, n. 27.

4. When interpreting a statute, a court must begin with its literal language. Moreover, "absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *North Dakota v. United States*, ____ U.S. ____, 103 S.Ct. 1095, 1102-1103 (1983).

1. CIC is a Supportive Service Needed to Assist Amber to Benefit from Her Special Education Program

CIC is a "supportive service" for Amber:

> CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace. *Tatro* II at 562, quoting from *Tatro v. State of Texas*, 481 F. Supp. 1224, 1227 (N.D. Tex. 1979) (*Tatro* I).

In the same sense, CIC is also a service Amber needs "to benefit from special education."

> Quite simply put, without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all. *Tatro* II at 562.

The District and *amicus* National School Boards' Association (NSBA) argue that, since Amber requires CIC before and after, as well as during, the school day, the need for CIC does not "arise [solely] from the effort to educate" her. *Tatro* I at 1227. From this they conclude that CIC is unrelated to Amber's learning, and thus cannot be a "supportive service" under 20 U.S.C. Section 1401(17). *Id.* at 1227.

This position reflects an artificially narrow view of the educational experience. For all students, handicapped and non-handicapped alike, the school day encompasses far more than formal academic instruction. Students are, after all, children, and they often need help with the activities of daily living which take place during the school day — they must remove their coats; they must eat; they must enter into and move about the classroom; and they must use the toilet.

Surely, it is a supportive service when a teacher pushes the wheelchair of a physically impaired child from one classroom to another, even though such assistance may also be necessary during the non-school portion of the day. Surely, it is a supportive service for an

adult to open the milk carton of a youngster who is unable to do it on his or her own, even though the same task must be performed at breakfast and at dinner. In any but the most narrow and myopic reading of the phrase, such services do in fact "arise from the effort to educate" because they make education possible.

A youngster who is offered an education program to which he cannot gain physical access or which does not provide him with the support necessary for him safely to get through the school day is just as effectively excluded from school as a youngster who is offered no program at all. As the Court in *Rowley, supra,* repeatedly emphasized, a major purpose of the EAHCA is to end the exclusion of handicapped children and to provide them with "access to public education." *Id.* at 180. This clear goal would be substantially defeated if the narrow interpretation of supportive services urged by the District and NSBA were adopted.

2. CIC is not a Medical Service

CIC is a simple aid to toileting which can be performed safely and quickly in school or at home by a person with no medical training. The primary equipment needed are a small, clean tube and a bottle.[5] Most children with spina bifida and normal intelligence can per-

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5. *Tatro* III at 970-971, n. 1. Of course, the Tatros provide even these materials. To the extent that true medical services are required in order for Amber to receive CIC, *e.g.*, the medical prescription and ongoing monitoring, these services are obtained outside the school setting and paid for by the Tatros. See, District Brief at 25-26 for list of such services. The Tatros have never requested that the District assume the "high cost of providing medical treatment" to Amber. In no conceivable sense did the decision of the Court of Appeals impose upon school districts obligations to "underwrite the massive financial obligations involved in providing all medical treatment . . . for more than eight million children. . . .," District Brief at 20, 22, nor will such a result flow from an affirmance by this Court.

form CIC on themselves beginning at approximately six to seven years of age. *Tokarcik, supra,* 665 F.2d at 458-459. A service that can be performed safely by children of such tender years is hardly one that should be labelled "medical treatment." Thus, a common sense, practical answer to the question of whether CIC is a medical service would result in an affirmance of the decision of the Court of Appeals in this case.[6]

The courts below, however, had more to rely on than their common sense — namely, the Act itself and the regulations implementing the Act. The regulatory definition of medical services is an early interpretation of the statute by the agency charged with its enforcement and, as such, it cannot be rejected "absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history." *Guardians Association v. Civil Service Commission of the City of New York,* ____ U.S. ____, 103 S.Ct. 3221, 3227 (1983) (opinion of White, J.); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978). As the Court below recognized, the definition is more than merely consistent with the statute. It gives proper weight to the Congressional decision to exclude genuine medical services from coverage while respecting handicapped children's broad entitlement to needed related services.

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6. The language of the statute makes clear that the mere fact that CIC must be provided under a physician's orders does not make it a "medical service." The EAHCA expressly requires the provision of physical therapy and audiological services, notwithstanding the fact that both are almost invariably provided under physicians' prescriptions. 20 U.S.C. Section 1401(17). Moreover, with medically involved children, many activities of daily living can involve physicians' prescriptions, such as proper seating, lighting, diet or restrictions on the length or strenuousness of activities. The prescriptions do not, however, make these program modifications into "medical services." See, Goldstein, Arkell, Ashcroft, Hurley & Lilly, "Schools," in II ISSUES IN CLASSIFICATION OF CHILDREN 4, 19-20 (N. Hobbs ed. 1975).

Medical services are

> services provided by a licensed physician . . . 34 C.F.R. Section 300.13(b)(4) (1983).

Medical Services are to be distinguished from "school health services." The regulations expressly designate the latter as related services and require that they be provided.

> "School health services" means services provided by a qualified school nurse or other qualified person. 34 C.F.R. Section 300.13(b)(10) (1983).

To determine whether CIC could be provided by a "school nurse or other qualified person," the District Court turned to state law for guidance. Based on a thorough review of applicable precedents, and with the assistance of the Texas Medical Association and the Dallas County Medical Society, the District Judge concluded that CIC could legally be performed by a school nurse or by any lay person who had completed a short period of training. Having concluded that CIC can be provided by any "qualified person," the District Court held that it was a school health service, not a medical service, and that the school distict was obliged to provide it to Amber. *Tatro* III at 976. These conclusions were upheld in *Tatro* IV at 827-829.

The District and *amicus* NSBA contend that the approach of the courts below and of the regulations — which look to whether medically skilled persons are needed to perform the service — is in error. *Amicus* NSBA suggests that the applicable test should be whether the need for the service arises from the "health needs" of the child, in which case the service is "medical" and is not required, or from the child's "education needs," in which case it is a related service and is required. Acceptance of this artificial distinction would reerect precisely the type of barrier to educational opportunity that Congress enacted the EAHCA to eliminate.

As this Court repeatedly recognized in *Rowley, supra,*

> the [EAHCA] evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individual consideration of and instruction for each child. *Id.* at 189 (emphasis in original deleted).

Thus, the Act's definition of "handicapped children" includes a wide variety of children, including, *inter alia,* children who are "health impaired . . . who *by reason thereof* require special education and related services." 20 U.S.C. Section 1401(1) (emphasis added). It is tautological that a health impaired child's need for special education and related services arises from a "health need." Nevertheless, such a child is clearly entitled to the protections of the Act.

Amicus NSBA's argument is further refuted by the express listing of physical therapy in 20 U.S.C. Section 1401(17). In the school setting, physical therapy is used to ameliorate the effects of a child's orthopedic impairment on his special education program. The need for physical therapy arises from a health need, *e.g.,* the child's physical impairment. But physical therapy is performed by a non-physician and is needed by some children to benefit from their special education programs. Thus, it is a non-medical related service, and the Act requires that it be provided. *Amicus* NSBA's suggested analysis, then, conflicts with both the spirit and the language of the EAHCA.

The District and *amicus* NSBA urge that the Court of Appeals' analysis should be reversed because Congress could not have intended the result. They argue, in effect, that Congress could not have meant what it clearly said. On the contrary,

Congress was aware of what it was doing, and the legislative history does not demonstrate that plain language was not intended. Petitioner's arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress. *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

C. The "Mainstreaming" Provision of the EAHCA, 20 U.S.C. Section 1412(5)(B), Requires that CIC Services Be Provided to Amber

The EAHCA "requires participating states to educate handicapped children with non-handicapped children whenever possible." *Rowley* at 202. The statutory language is clear:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> * * *
>
> The State has established . . . procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . 20 U.S.C. Section 1412(5)(B). See also, 20 U.S.C. Section 1414(a)(1)(C)(iv).

This "mainstreaming" requirement dictates the affirmance of the decision of the Court of Appeals in two

ways. First, for Amber, CIC is a "supplementary service" which she requires in order to be educated in the regular classroom. Second, the mainstreaming mandate further supports the argument, see Section II(B), *supra*, that CIC is a related service.

Congress viewed the mainstreaming mandate as a key requirement of the EAHCA.[7] While it recognized that some children are so severely impaired that they require education in separate settings, Congress declared that such segregation will be tolerated only when necessitated by the child's needs, and not because of administrative convenience or other non-educational factors. *Hairston, supra*, 423 F. Supp. at 183-184. See *Springdale School District v. Grace*, 693 F.2d 41 (8th Cir. 1982), *cert. den.* ____ U.S. ____, 103 S.Ct. 2086 (1983).

Amber is entitled to receive CIC from the District because CIC is a "supplementary service" which must be provided to prevent her "removal . . . from the regular education environment." 20 U.S.C. Section 1412(5)(B); *Tokarcik, supra*, at 457. Like most children with spina bifida, Amber is intellectually normal. If CIC is provided, she can attend regular education classes. Without CIC, her practical options will be limited to more costly homebound instruction or to placement in a private

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7. See, *e.g.*, S. Rep. 94-455, 94th Cong., 1st Sess. 30 (1975) (Conf. Rep.), *reprinted in* 1975 U.S. Code Cong. & Ad. News, 1480, 1483; 121 Cong. Rec. 19484 (1975) (Sen. Stafford); 121 Cong. Rec. 19485 (1975) (Sen. Williams); 121 Cong. Rec. 19505 (1975) (Sen. Humphrey); 121 Cong. Rec. 23703 (1975) (Rep. Brademas); 121 Cong. Rec. 25539 (1975) (Rep. Miller).

Congress also understood that the implementation of this mainstreaming mandate required dramatic changes, including the retraining of regular as well as special education personnel. This retraining had to direct itself both to the acquisition of new skills and to the eradication of old sterotypes and attitudes. The Act committed substantial federal funds for these state and local training efforts. 20 U.S.C. Sections 1413(a)(3), 1431-1436. See also, Conf. Rep., *supra*, at 40-41, *reprinted in* 1975 U.S. Code Cong. & Ad. News, *supra*, at 1484; 121 Cong. Rec. 19483 (1975) (Sen. Randolph).

school, either of which would isolate her from non-handicapped friends and peers in a setting that bears no relation to her educational needs and abilities. See, *e.g.*, *Department of Education, State of Hawaii v. Katherine D.*, *supra* (child denied services to maintain her tracheostomy tube and offered only homebound instruction); *Hairston v. Drosick*, *supra*. This is a result which Congress expressly forbade, and which this Court cannot permit.

Moreover, the mainstreaming provision of the Act reinforces the position that CIC is a related service. When interpreting the multiple provisions of a single comprehensive enactment, a court should attempt to construe the sections so that they are not in conflict with, but rather enhance, one another. See, *Richards v. United States*, 369 U.S. 1, 11 (1962). As the *Tatro* II court recognized,

> [c]onstruing the term "related services" to exclude services like CIC, necessary to keep a handicapped child in the classroom, would completely eviscerate this [mainstreaming] mandate. This we cannot do. *Id.* at 563.

II. Amber is Entitled to CIC Services from the District Under Section 504 of the Rehabilitation Act of 1973

The Court of Appeals held that Amber is entitled to receive CIC services under Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. Section 794 (Section 504), because she is a qualified handicapped individual who would otherwise be excluded from participation in and denied the benefits of the District's federally assisted education program.[8] This holding is correct and should be affirmed.

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8. The full text of Section 504 is as follows:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

The District and *amicus* NSBA contend that this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), dictates reversal of the decision below. In *Southeastern*, this Court held that an "otherwise qualified handicapped individual" is one who meets all of a program's eligibility requirements in spite of the handicap. *Id.* at 406. The Court also held that Section 504 does not require a recipient of federal financial assistance to undertake a fundamental alteration in the nature of its program to meet the special needs of handicapped persons. *Id.* at 411.

From these premises, the District erroneously concludes that under no circumstances does Section 504 require a recipient of federal funds to take *any* steps to accommodate the needs of the handicapped, and accordingly argues that it is not obligated by Section 504 to provide Amber with CIC services. This position is neither compelled by nor consistent with *Southeastern*. Rather, *Southeastern* recognizes that Section 504 requires a recipient to undertake simple, inexpensive accommodations when necessary to allow a qualified handicapped person the opportunity to participate in federally assisted programs. See, *Strathie v. Department of Transportation*, 716 F.2d 227, 231-232 (3d Cir.

NOTE — *(Continued)*

jected to discrimination under any program or activity receiving Federal financial assistance . . . .

It is undisputed that Amber is handicapped. 29 U.S.C. Section 706(6); 34 C.F.R. Section 104.3(j)(2)(iii) (1983). It is also clear that the District is a recipient of federal financial assistance. *Tatro* IV at 832. Moreover, there is no question that Congress intended Section 504's protections to extend to students such as Amber. S. Rep. No. 93-1297, 93d Cong. 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-89. See also, *id.* at 6407-6408 (explaining that one rationale for broadening the statutory definition of "handicapped individual" under Section 504 was to ensure coverage of handicapped children who might otherwise be denied admission to public school programs).

1983); *Dopico v. Goldschmidt*, 687 F.2d 644, 653 (2d Cir. 1982); *Majors v. Housing Authority of City of DeKalb, Ga.*, 652 F.2d 454, 457 (5th Cir. 1981). See also, *Prewitt v. United States Postal Service*, 662 F.2d 292, 307 n. 21 (5th Cir. 1981). The District's arbitrary refusal to take the minimum steps involved in providing CIC to Amber constitutes precisely the sort of discrimination which Section 504 prohibits.

Unlike the plaintiff in *Southeastern*, Amber is an "otherwise qualified" handicapped individual with respect to the program at issue because she meets all of the legitimate eligibility requirements for that program in spite of her handicap. Legitimate requirements for public school attendance are dramatically different from the requirements of the post-secondary nurses' training program which was the subject of *Southeastern*. Virtually all states provide that when children reach a certain age, they are eligible for public school programs, and in fact, they and their parents are usually subject to civil and criminal sanctions should they not attend. When Amber reached the age of three, she met all of Texas' legitimate eligibility requirements and was therefore an "otherwise qualified" individual with respect to the District's education program. 34 C.F.R. Section 104.3(k)(2) (1983) (similarly defining "qualified handicapped persons" as youngsters of school-age).

Section 504 requires that qualified handicapped individuals be offered aids, benefits and services on an equal basis with the non-handicapped. 34 C.F.R. Section 104.4(b) (1983). However,

> in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect

> to the provision of educational services to students whose primary language is not English. see *Lau v. Nichols*, 414 U.S. 563 (1974). 34 C.F.R. Part 104, Appendix A, No. 6 (1983) [explaining "equally effective services requirement" in 34 C.F.R. Section 104.4(b)(2)].

Accord, Southeastern, supra; Strathie, supra at 231-232; *Dopico v. Goldschmidt, supra* at 653; *Majors v. Housing Authority of City of DeKalb, Ga., supra* at 457; *Prewitt v. United States Postal Service, supra* at 307 n. 21.

The District is not meeting Amber's needs to the same extent that the corresponding needs of her non-handicapped classmates are met. Obviously, the main mission of school districts is to educate their students, and the district is offering public education programs to its other school-aged residents. By refusing to provide Amber with the simple and inexpensive accommodation of CIC, the District is for all practical purposes excluding her from the education program which it developed and recommended for her. Such exclusion violates Amber's rights under Section 504 to equal treatment.[9]

The Petitioner and *amicus* NSBA argue that Amber is not being excluded from or denied the benefits of the District's educational program, because the educational program they have offered Amber is available for her use on the same basis as it is available to youngsters who do not have her physical limitations. This position is disingenuous at best. The program offered Amber is no more available to her than is a similar program offered to a

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9. The District is also discriminating against Amber in another way. The District, like all other school districts, routinely provides its non-handicapped students with assistance in tasks of daily living, including toileting. Amber needs the same type of assistance provided in a different manner, that is, Amber needs CIC. The refusal to provide this accommodation, thus denying her services provided to non-handicapped youngsters, also violates Section 504.

child in a wheelchair — in an inaccessible second floor classroom. Such technical and absurd positions are not consistent with and are not countenanced by the terms or the spirit of Section 504.

The District refuses to recognize that, due to tremendous medical and technological advances in the last twenty years, catheterization has progressed from a complex, technical procedure to one which imposes no undue fiscal or administrative burden of any kind. Until about 1966, a child like Amber would have been catheterized in the morning, the catheter remaining inside her throughout the day with a bag attached to the outer end of the catheter to collect the fluid. In the mid-sixties, it was discovered that these in-dwelling catheters caused bacterial infections which often resulted in the death of these children in infancy or early childhood. Sterile catheterization then became the procedure of choice, similar to CIC but involving sterile equipment and a sterile environment. *Tokarcik v. Forest Hills School District*, No. 79-388, slip op. 4-5 (W.D. Pa., Oct. 31, 1980); *Tatro* III at 974. In recent years, CIC has become the universally preferred procedure for children with spina bifida. CIC is done by a lay person in only a few minutes and without the need for special equipment or a sterile environment. This Court's words in *Southeastern* are particularly pertinent:

> Technological advances . . . may enable attainment of these goals [rehabilitating and employing the handicapped] without imposing undue financial and administrative burdens upon a [recipient]. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. *Id.* at 412-413.

Moreover, the non-discrimination requirement of Section 504 mandates that recipients not operate federally assisted programs in such a way as to perpetuate the stigma which the handicapped have historically suf-

fered. Note, "Accommodating the Handicapped: Rehabilitating Section 504 After *Southeastern*," 80 Colum. L. Rev. 171, 175 (1980); *Strathie v. Department of Transportation, supra* at 231; *New York State ARC v. Carey*, 612 F.2d 644, 651 (2d Cir. 1979) (isolation in special classes of retarded children with Hepatitis-B violates Section 504). Thus, the regulations also require that services be provided which

> afford the handicapped persons equal opportunity . . . to gain the same benefit . . . in the most integrated setting appropriate to the person's needs. 34 C.F.R. Section 104.4(b)(2) (1983).

This is Section 504's analogue to the EAHCA's mainstreaming requirement.

The District's treatment of Amber in this case presents a classic example of the second class treatment of the handicapped. If Amber receives CIC services from the District, she can attend a regular education program. If she does not, the benefits of the District's program will be available to her only in a placement limited to handicapped youngsters (or, if homebound instruction is offered, isolated from any other youngsters at all). Such stigmatizing and disadvantageous treatment, completely lacking in any reasonable basis, runs clearly counter to the mandate of Section 504.[10]

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10. The District argues that Section 504 provides no protection to handicapped public school students, the EAHCA having preempted this field in its entirety. Such a conclusion is rebutted by the legislative history of Section 504 and the EAHCA.

In 1974, Congress amended the definition of "handicapped individual" as applied to Section 504 for the express purpose of clarifying its application to, *inter alia*, public school students. P.L. 93-516, 29 U.S.C. Section 706(6); S. Rep. No. 93-1297, 93rd Cong. 2d Sess. 30 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388-89 (see, footnote 8, p. 21, *supra*). In the same report, the Committee noted that the EACHA was in its final stages of passage. *Id.* at 6408. Congress would hardly have amended the Rehabilitation Act to insure inclusion of handicapped public school students if it

CONCLUSION

For the above-cited reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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immediately intended again to remove that group from the Act's coverage with passage of the EAHCA. See also, the legislative history of the EAHCA at S. Rep. No. 94-168, 94th Cong. 1st Sess. 12, 26 (1975), *reprinted in* 1975 U.S. Code Cong. & Adm. News 1425, 1436, 1451-1452; *Georgia Association for Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1579 (11th Cir. 1983) (discussion, *inter alia*, of the differences in the two statutes as grounds for rejecting the preemption argument).

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No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,

PETITIONER,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,

RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Questions Presented

1. Whether clean intermittent catheterization (CIC) is considered a medical service for the purposes of the Education for All Handicapped Children Act (EAHCA).

2. Whether clean intermittent catheterization (CIC) is a related service necessary to enable the Respondent to benefit educationally from special instruction.

3. Whether this case should be remanded for reconsideration of the individualized education plan in light of the standards set by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ___ U.S. ___, 102 S.Ct. 3034 (1982).

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RESPONDENTS,

ON WRIT OF CERTIORARI TO THE
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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Texas Association of School Boards' Legal Assistance Fund, by and through their attorney of record, Susan Feller Heiligenthal, and, pursuant to Rule 36 of the Supreme Court rules and procedures offers herewith its brief

of amicus curiae in support of Petitioners, the Irving Independent School District, its board of trustees and its superintendent.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards' Legal Assistance Fund is a non-profit organization whose membership is made up of more than 1,000 school districts throughout the State of Texas. The Association is active in its efforts to represent and assist local school districts throughout the state, expressing the concerns of member schools on issues of state or nationwide importance in public education. These member schools educate over 99% of the student population in elementary and secondary schools in the state.

All parties to the case have consented to the filing of this brief of amicus curiae.

ARGUMENT

I. Clean intermittent catheterization (CIC) should be considered a medical service for the purposes of the Education for All Handicapped Children Act (EAHCA) and, therefore, need not be provided by school districts to special education students such as Respondent.

To include, when appropriate, handicapped students in regular classroom experiences and to provide them with necessary, nonmedical related services necessary to benefit from that education, Congress passed the Education for All Handicapped Children Act of 1975. See 20 U.S.C. §1401 et seq.; H.R. Rep. No. 94-332, p. 2 (1975). The EAHCA requires state and local agencies receiving its funds to guarantee handicapped students the right to a "free appropriate education" consisting of special education and related services. 20 U.S.C. §§1401(18), 1412(1).

Special education may include classroom instruction, home instruction, or instruction in hospitals and institutions designed to meet the unique needs of each student. 20 U.S.C. §1401(16). But the EAHCA involves more than strictly education. Nonmedical services additionally may be required for a student to enable him to benefit from the educational opportunity. Those services, referred to in EAHCA as "related services" may involve transportation, developmental, corrective, and other supportive services. Examples in the EAHCA include

1) speech pathology and audiology,
2) psychological services,
3) physical and occupational therapy,
4) recreation, and
5) medical and counseling services "except that such medical services shall be for diagnostic and evaluation purposes only" 20 U.S.C. §1401(17) (emphasis added).

The federal statute makes no reference to other school health services. Yet, in the regulations implementing the EAHCA, "school health services" was added to the list of related services that must be available. 34 C.F.R. §300.13(a). This extension of related services to include "school health services" was purely a creation of the Department of Education. The Department's intent was admirable - - to insure the continued availability to special education students, as with all students, of the types of health services ordinarily provided by schools. However, the result has been to spawn attempts to expand school health offerings to include additional medical services.

Two problems exist. First, the requirement for "school health services" was created by regulation, which alone

is questionable. But, secondly, having created the term "school health services," the regulations offer no relevant guidance on the distinction between "school health services" and "medical" services. While the regulations do not generally define what constitues a medical service, they do limit required medical services to the diagnosis and evaluation of a medically-related handicap, which must be performed by a licensed physician. 30 C.R.F. §300.13(b)(14). The clear purpose is to require the necessary medical services to determine a child's medically related handicap, but not to require continuing medical services appropriate for a licensed health facility. The public schools are not hospitals. Similarly, the school health services created by regulation are not defined but only described by reference to who provides them, i.e., a "qualified

school nurse or other qualified person." 34 C.F.R. §300.13(b)(10). These inadequate descriptions of the distinctions between the regulatory creation of "school health services" and the statutorily required "medical services" has led to a wealth of litigation.

Legislative history does not reveal congressional intent in defining medical services. In lieu of such history, "medical services" should be given its commonly understood meaning. 82 C.J.S. Statutes §332 (1953). Unfortunately, the Fifth Circuit has misconstrued the statutory limitation that "medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. §1401(17); Tatro v. Texas, 625 F.2d 557, 562-564 (5th Cir. 1980)(hereinafter cited as Tatro I). That court erroneously assumed that the limitation on medical services did not apply to

other medical services provided by health professionals under a physician's direction.

It is doubtful that Congress intended to exclude other services not directly performed by but at the direction of a physician from the term "medical services." Obvious examples are such medical services as dialysis, intravenous feeding, nasalgastric feeding, respirator monitoring, catheterization, and radiation treatments.

In contrast, the commonly understood meaning of "school health services" are those services routinely provided by school nurses, such as dispensing medication prescribed by doctors, rendering first aid, and supervising health screening and immunization programs. The fact that these nurses may incidentally be qualified to perform all the duties of a hospital nurse

should not be used to expand the definition of "school health services" to include services such as catheterization, transfusions, and intravenous feedings, which are normally offered in a hospital's more sterile, environmentally-controlled facilities. It is far more reasonable to interpret "school health services" in the special education context to cover routine school functions such as administering prescribed medication or emergency assistance to students suffering from seizures.

This is particularly important to Texas school health employees in that Texas laws grant immunity to school nurses only for student injuries inadvertently arising from the administering of medication upon a parent's request. Tex.Educ.Code Ann. §21.914 (Vernon Supp. 1982-83). Expanding required services to include

administering catheterization to special education students creates a potential threat of personal liability to school health personnel not operating under the supervision of licensed physicians within the controlled structure of a hospital or other registered health facility.

The only other court to closely consider this definition was the Third Circuit. Tokarcik v. Forest Hills School District, 665 F.2d 443, (3rd Cir. 1981) cert. denied. sub nom. Scanlon v. Tokarcik, ___ U.S. ___, 102 S.Ct. 3508 (1982). That court largely based its conclusion on the precedent set by the Tatro I decision, which is the subject of this review.

The broad constructions of "school health services" by the Tokarcik and Tatro I courts lead to the unreasonable and surely unforeseen result of requiring that any medical impediments

to regular classroom attendance be removed. It stretches credulity to believe that such was the intent of Congress in its effort to extend basic education services to the handicapped.

When the terms "medical services" and "school health services" are considered in their proper context, it is clear that catheterization is indeed more a "medical service" for the purposes of the EAHCA. As such, school districts should not be required to provide catheterization as one of their legal obligations. This is not to say that a child will be excluded from the educational program, but only that other arrangements should be made so that the student can receive appropriate educational services from the public school while continuing to receive medical services under existing arrangements.

II. Clean intermittent catheterization (CIC) is not a related service necessary to enable the Respondent to benefit educationally from special instruction.

The EAHCA requires that a student's individual education plan (IEP) include provisions for related services to the extent a student needs them to benefit from special education.

The standard for interpreting when a related service becomes necessary has caused the proliferation of litigation in this area. Among the most important and far-reaching interpretations of the role of related services were those made by the Fifth Circuit, which concluded in this case that clean intermittent catheterization (CIC) is a related service. Tatro I. These interpretations not only portend financially onerous consequences for taxpayers and increased confusion on how to treat medical and health services in

deciding on student placements, but they also far exceed the guidelines subsequently later established by this Court in Rowley.

In its second consideration of Tatro, which occurred after the Rowley opinion was issued, the Fifth Circuit held that it must follow its previous interpretations of the EAHCA under "law of the case" principles "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," Tatro v. Texas, 703 F.2d 823, 826 (5th Cir. 1983)(hereinafter cited as Tatro II (citing White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967)(footnote omitted; enumeration added). The Tatro II panel concluded that none of these considerations

applied.

But this Court had indeed "made a contrary decision of the law applicable to such issues." Id. This Court examined whether the related service was necessary "to permit the child to benefit educationally from the [personalized] instruction." 102 S.Ct. at 3042. It did not base this standard on attendance, at any cost, in regular classes. By contrast, the Tatro I panel went beyond this standard in determining whether the related service was necessary not only for the student to benefit from special education, but also to be able to attend regular classes.

In the first district court opinion, Judge Higgenbotham had correctly recognized that CIC should be required under the statute only if necessary for the student to fully benefit from special education. 481 F.Supp. 1224, 1227 (N.D.Tex. 1979). This ruling, very

similar to the one in Rowley, was reversed by the Tatro I Fifth Circuit court. The Tatro I panel found, at variance with the Rowley standard, that since CIC was necessary for the student to attend regular classes, it must be provided regardless of whether or not a free appropriate education could be otherwise provided. In this case, the life support service had to be provided during school hours if the child was to attend regular classes. This expanded interpretation by the Tatro I panel is crucial since, logically extended, it could require some classrooms to be equipped with hospital beds and medical monitoring devices at public expense in order to provide similar life support services during school hours for children attending regular classes. See 625 F.2d at 563.

The EHA guarantees that students be educated in the least restrictive

environment appropriate. 20 U.S.C. §1412(5)(B). The test, as pointed out in Rowley, is not what could be offered or what would be the most ideal placement but whether the placement is appropriate. Thus, for a child needing life support services, an environment that is more restrictive than a regular classroom may be the least restrictive environment appropriate for that student. A comparison would be that of an unfortunate child confined to an iron lung for his daily survival. The least restrictive environment would be in a regular classroom structure. However, the least restrictive environment appropriate may be a homebound placement. The same rule should apply in this case. For this Court to decide otherwise will require the extensive expansion into the medical services field by school districts across the nation.

III. This case should be remanded for reconsideration of the individual education plan in light of the standards set by this Court in Rowley.

The individual education plan (IEP) under review here was drawn up five years ago. Even Respondent admits that this case may well be moot by the time this Court reaches a decision. Respondent's Brief in Opposition to Petition for Certiorari, at 9. Several cases have already been remanded for reconsideration in light of the standards established by this Court in Rowley. See Springdale School District No. 50 of Washington County v. Grace, 693 F.2d 41 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 2086 (1982); Grkman v. Scanlon, 563 F.Supp. 793 (W.D.Pa. 1983).

Since Rowley was decided after both Tatro I and the second district court ruling, Tatro v. Texas, 516 F.Supp. 968

(N.D.Tex. 1981), the petitioners argued to the Tatro II court that if the student could benefit from special education at home or in another institution providing CIC, their obligation to provide a free, appropriate education under EAHCA would be met. 703 F.2d at 829. The Tatro II panel erred in holding that the petitioners were estopped from such a claim, since it was raised for the first time after the Rowley ruling and no attempt had been made to modify the IEP accordingly. That panel should have followed the lead of this Court and the Third Circuit and remanded the case to federal district court for its first review using the new Rowley standard.

The original 1979 IEP for the student in this case apparently had not anticipated the Rowley interpretation of "related services," and had not considered alternative placement options

other than home placement that could have provided Respondent with needed special education services without the provision of CIC. For the most part, the many stipulations of fact that have been made during the course of this litigation were made in determining issues not relevant to the application of the Rowley standard. The Tatro II court, as an appellate court, is not in the position to receive the additional evidence from both parties that may be necessary to determine an appropriate placement if it is determined that the 1979 IEP is inappropriate. The mere addition of CIC services will not necessarily cure defects in that plan, and all of the placement considerations should be reexamined in the wake of Rowley.

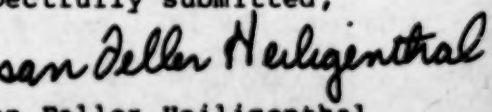
The decision of the court below, constrained by the Tatro I interpretations of the EAHCA issued

prior to and in conflict with this Court's interpretation of the law in Rowley, creates an untenuous situation where the definition of related services has been greatly expanded. Rather than prescribe a double standard in defining "related services," this Court's interpretations in Rowley should be applied and the Court should remand the case to federal district court for proper application of that standard. If this Court's interpretation is not adopted by the Fifth Circuit, existing case law absolving schools of financial responsibility for custodial and medical services will no longer be followed. See McKenzie v. Jefferson, 565 F.Supp. 404 (D.D.C. 1983). The financial implications of leavng the Fifth Circuit's ruling undisturbed are enormous.

CONCLUSION

For the foregoing reasons, the school districts of Texas, through the Texas Association of School Boards' Legal Assistance Fund, respectfully request a reversal of the ruling that clean intermittent catheterization (CIC) constitutes a related service for the purposes of the Education for All Handicapped Children Act (EAHCA). In addition, they request that this Court remand the case to federal district court for reconsideration of the appropriateness of Respondent's individual education plan (IEP) in light of the standards set in Rowley.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae in support of Petitioner have been served this day upon all parties by placing same in the United States Mail addressed to:

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Respectfully submitted,

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January 30, 1984

No. 83-558-CFX
Status: GRANTED

Title: Irving Independent School District, Petitioner
v.
Henri Tatro, et ux., Individually and as next friend of Amber Tatro, a Minor

Docketed:
October 3, 1983

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Deatherage, James M.

Counsel for respondent: Todd, James C.

Entry	Date	Note	Proceedings and Orders
1	Oct 3 1983	G	Petition for writ of certiorari filed.
2	Nov 1 1983	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
3	Nov 4 1983		Brief amicus curiae of Texas Assn. of School Boards filed.
4	Nov 7 1983		Brief of respondents Henri Tatro, et ux. in opposition filed.
5	Nov 9 1983		DISTRIBUTED. November 23, 1983
7	Nov 28 1983		REDISTRIBUTED. December 2, 1983
8	Dec 5 1983		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
9	Dec 5 1983		Petition GRANTED.
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10	Dec 9 1983		Record filed.
11	Dec 9 1983		Certified original record 6 C.A. proceedings, 9 volumes received. (Box).
12	Jan 16 1984		Record filed.
13	Jan 16 1984		Certified copy of exhibits received.
14	Jan 18 1984		Brief of petitioner Irving Indep. Sch. Dist. filed.
15	Jan 18 1984		Joint appendix filed.
16	Jan 19 1984		Brief amicus curiae of Natl. School Boards Association filed.
17	Jan 18 1984		Brief amicus curiae of American Assn. of School Administrators filed.
18	Jan 19 1984		Brief amicus curiae of Texas Assn. of School Boards filed.
20	Feb 1 1984		Order extending time to file brief of respondent on the merits until March 23, 1984.
21	Feb 3 1984	D	Motion of American Association of School Administrators for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
22	Feb 21 1984		Motion of American Association of School Administrators for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
23	Mar 20 1984		SET FOR ARGUMENT. Monday, April 16, 1984. (3rd case)
24	Mar 22 1984		Brief amicus curiae of The Spina Bifida Assoc. et al. filed.
25	Mar 26 1984	G	Motion of New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System for leave to file a brief as amicus curiae filed.
26	Mar 26 1984		Brief of respondents Henri Tatro, et ux. filed.
27	Mar 27 1984		CIRCULATED.
28	Mar 26 1984	G	Motion of Association for Persons with Severe Handicaps, et al. for leave to file a brief as amici curiae filed.
29	Mar 26 1984	G	Motion of New Jersey Department of the Public Advocate for leave to file a brief as amicus curiae filed.
30	Apr 2 1984		Motion of New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System for leave to file a brief as amicus curiae GRANTED.
31	Apr 2 1984		Motion of Association for Persons with Severe Handicaps, et al. for leave to file a brief as amici curiae GRANTED.
33	Apr 2 1984		Motion of New Jersey Department of the Public Advocate